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STUDIES IN THE SOCIAL SCIENCES NUMBER 8

THE PETITION OF RIGHT

BY

FRANCES HELEN RELF, Ph.D.

MINNEAPOLIS
Bulletin of the University of Minnesota
December 1917

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PREFACE

In the history of parliamentary procedure, the Petition of Right is unique; it has no precedent, it has never served as one. It was not, as has been commonly supposed, a law, or even the equivalent of a law. Though in the ordinary form of a petition, it differs from any other petition that was ever presented to a king. The peculiar character of the Petition is what I hope, in this study, to prove and explain. Such a study would hardly justify itself if its end were only the explanation of a unique bit of parliamentary procedure. Procedure which never became a precedent has little value in itself. In the case of the Petition of Right, the procedure has value because it alone reveals what a struggle took place in 1628 between Charles I and the House of Commons. From the content of the Petition all historians have recognized that in that year a great constitutional issue was at stake. But from lack of information they have assumed that the passage of the Petition denoted a complete victory for the Commons, a result which could have been the end only of a fight where the opponents were of very unequal strength. Not one writer has explained why the Commons went by petition instead of bill. Even Gardiner, who was the first to point out that they tried first to go by bill, missed entirely the significance of the change. In missing this he missed much, for in the change from bill to petition and in the subsequent procedure upon the petition are revealed the bitterness, the, at times, almost complete hopelessness of the struggle. More than that they alone reveal that the end was not victory, as has been commonly supposed, but compromise.

Samuel Rawson Gardiner wrote his story of the passage of the Petition of Right some forty years ago. The sources accessible to him were so much more ample, his insight and critical faculty were so much greater that he has entirely superseded all who wrote before him. Since his day nothing new on this subject has been written. Perhaps one reason is to be found in the fact that the student hardly expects to find out anything new about so important a subject. But an even more probable reason is to be found in the prevalent feeling that Gardiner made the period of the early Stuarts peculiarly his own; that he not only superseded all who had written before, but that for all time to come those who follow can be only gleaners in his field. Such a conception betrays a misunderstanding of the real intention of Gardiner's work. What he really did was to give a general survey of what may be called, when we consider the great number of important events that are crowded into it, a long period. For most periods such a work has followed, and been based upon, particular studies.

Gardiner had no such help; he was practically a pioneer in the field.[1] As such, the only way that he could possibly cover the ground was by attempting nothing more than to tell what happened. Such a treatment ought to encourage rather than discourage further investigation. It is but the starting point for the student who wishes to find out the why and wherefore of some particular problem.

With only the material that Gardiner had it would be possible for the student, who wished to make an exhaustive study of the Petition of Right, to tell much more than Gardiner told. But on the other hand it would be ridiculous for any student of to-day to think that in the forty years which have elapsed since Gardiner wrote those particular chapters of his history, no new material had been found. Through additions to the British Museum and even more through the work of the Historical Manuscripts Commission a great deal of valuable material on this subject has been brought to light. It is only since more detailed journals of what took place in the lower House of Parliament in 1628 have been discovered that it has been possible to ascertain the real nature of the Petition of Right. Gardiner, no more than his predecessors, knew enough to doubt that the Petition had the force of a law. His additional material failed him entirely for the last month of the Session, days so very important for the light they throw on the nature of the King's answer as well as on the procedure which followed. Even for the first part his material was not ample enough to make the issues clear.[2] With the material which is now available, it is possible for the first time to make an adequate study. The sources not before used are Borlase, Grosvenor, Lowther, the second volume of the Harleian *Notes*, and that part of the *True Relation* which narrates the proceedings for the last month of the Session. Including the old with the new, there are six independent accounts of proceedings in the House of Commons. Only one of these, Nicholas, had been used in its entirety. Three are wholly new. It was this wealth of new material which suggested as well as made possible this study of the Petition of Right.[3]

In this study the writer has assumed on the part of the reader a knowledge of Gardiner's account of the Session of Parliament for 1628. As has already been stated, that must be the starting point for any detailed study of this period. By taking for granted a familiarity with that work, the

[1] For a comparison of the source material used by Gardiner and his predecessors, see the bibliographical notes. Not only was Gardiner the first to make use of an account which was anywhere near complete, but he was the first who had any other independent accounts by which to check it. The diaries he used are not wholly adequate for this purpose, as can be seen from the comment upon them.

[2] It is the Borlase account which makes one realize the significance of the draft for the judgment which was brought in by Selden in his report.

[3] It was while working with Mr. Wallace Notestein on the sources for the Session of 1629 that I first became acquainted with these manuscripts. In searching for copies of the *True Relation*, we discovered this new material for the session of 1628.

writer could omit a narrative of events and an account of the men who were leaders in the struggle. By disregarding chronological sequence and explanation of men and events it became possible to present the subject topically and so bring out at one time all the evidence to prove a given point.

To the University of Minnesota the writer is indebted for making it possible to do all the work on this study while in residence. Under a research appropriation, photographs were made of the Grosvenor manuscripts, and rotographs of the Borlase and Harleian. Rotographs of the Nicholas *Notes* were already in the University Library, as was also the large collection of printed sources which makes Minnesota one of the few Universities in this country for research in the early Stuart period. Through the kindness of Mr. Worthington Ford, the University was enabled to borrow from the Massachusetts Historical Society their copy of the *True Relation*. Too much can not be said for the advantages to be derived from having all one's material in the same place. Good results can not be obtained if one is obliged to consult one source at a time and then depend upon notes. The writing in seventeenth century diaries is so difficult to decipher that one dare not depend upon the work of a copyist, but modern photography gives the student the equivalent of the originals themselves. It has made it possible in this case to compare with each other manuscripts in Trinity College, Dublin; the British Museum; the Record Office; and at the University of Minnesota.

The writer is under obligation to Professor C. D. Allin for help on the judicial powers of Parliament in the seventeenth century, to Dean W. R. Vance and Professor A. B. White for reading and criticizing the whole manuscript, but especially to Professor Wallace Notestein under whose supervision the study was prepared as a doctor's dissertation.

FRANCES HELEN RELF

CONTENTS

KEY TO ABBREVIATIONS

This monograph has been based largely upon certain important manuscripts. For reference to these in the footnotes it has been found convenient to adopt arbitrary abbreviations, the key to which is given below. Where copies of the manuscripts have been used, the page references in the footnotes are to them and not to the originals. To avoid any misunderstanding there have been included in the key the often-used abbreviations of certain printed material.

B	The Borlase Manuscript, British Museum, Stowe 366.
G	Sir Richard Grosvenor, *Notes of Proceedings*, Library of Trinity College, Dublin.
H	*Notes*, British Museum, Harl. 2313 and 5324.
L	Lowther, *Notes*, Hist. MSS Comn. 13th Rep. App. 7, pp. 33-60.
M	*The True Relation.* The copy used is that in the possession of the Massachusetts Historical Society.
N	Sir Edward Nicholas, *Notes*, Miss Louise Sumner's manuscript edition, Library of the University of Minnesota.
L.J.	*Journals of the House of Lords.*
C.J.	*Journals of the House of Commons.*
O.P.H.	The old *Parliamentary History.*
E.P.	*Ephemeris Parliamentaria.*

THE PETITION OF RIGHT

CHAPTER I

THE DECISION IN THE FIVE KNIGHTS' CASE

The Petition of Right was the culmination of the struggle in 1628 between Charles I and the Commons. Any explanation of the Petition must, therefore, begin with an analysis of that struggle.

It was only with the greatest reluctance, urged on by his need of money, that the King had called his third Parliament. Neither he nor anyone else doubted that there would be trouble with the Commons, that there would be a protest against his arbitrary government. The King's fears were somewhat allayed when he found that the protest was not to take the form that he most feared—that of an attack upon his ministers. The Commons had determined to fight principles rather than men. They began by an enumeration of grievances. Miscellaneous as these appear on the surface, they all go back to a common cause, the King's unconstitutional methods of taxation. Of these the forced loan was the most obnoxious; it would seem at first that that was the root of all the evil. From it had grown the abuses of arbitrary imprisonment and billeting, both having been used as punishment for non-payment. But as one reads more carefully the informal debate of those first few days, he comes to realize that the Commons were conscious of a greater grievance than any they specifically enumerated. They feared absolutism and the end of parliaments. It was this fear that made them focus their effort on that grievance which was most directly a protest against arbitrary government, that of imprisonment by the King without any cause being shown. That the King and his ministers realized fully the significance of the protest is shown by their unwillingness to yield on this point though they granted everything else demanded by the Commons. Thus arbitrary imprisonment became the great bone of contention between King and Commons. A careful consideration of this grievance becomes, therefore, the first step in explanation of the Petition of Right.

Unlike the other grievances enumerated by the Commons in the Petition of Right, that of arbitrary imprisonment was purely judicial in its nature. The others were each a general protest against many particular cases of a similar nature. This harked back to one special case, which had already been tried in the courts, a case which at the time was always referred to as "the late habeas corpus case," but which is better known to-day as that of the Five Knights.[1] In order to understand why that

[1] It is also popularly referred to as "Darnel's Case," and that in spite of the fact that Darnel refused to plead.

particular case was made a parliamentary grievance it is necessary to examine it in detail with reference, first, to the decision of the judges.

The case came up in 1627, and was the direct outgrowth of the attempt to collect the forced loan. The commission and instructions for collecting the loan had been issued in September of 1626.[2] From the beginning there were many who refused to contribute,[3] but it was not until Hyde had been made Chief Justice of the King's Bench that commitment for refusal began. According to a letter-writer of the time,[4] commitment had been urged by certain privy counsellors but the King had stood out against it; with a subservient chief justice, however, the danger from such a course was greatly lessened. From the beginning of February the commitments came thick and fast. As a result many paid, but many others continued to refuse, glorying in their imprisonment as a public protest against the illegality of the loan. As the months went by, however, and the hope of release grew slight,[5] some of the prisoners began to realize that the country was threatened with a greater danger than that of arbitrary taxation. If the privy counsellors were to be permitted to commit men to prison at will, no resistance short of revolution could keep them from enforcing any demand they wished. Then it was that five of the prisoners[6] determined to bring their case before the King's Bench, and to that end applied for the writ of habeas corpus. The writ was granted; largely, no doubt, because even as early as this the case had gained great publicity.[7] "This Habeas Corpus," said Attorney Heath, "was sent out by special command, because these gentlemen gave out in speeches . . . that they did wonder why they should be hindered from trial."[8] Even with Hyde as chief justice the King still stood out against the legality of the loans being tested in the courts. He gave way and consented to the trial only after a conference with the judges at which he was "appeased by reasons."[9] It seems probable that at this conference the character of the return to the

[2] *Cal. S. P. Dom.*, 1625-26, pp. 435, 436.

[3] ——— to Mead, October 6, 1626. *Court and Times* 1:154.

[4] ——— to Mead, November 4; December 1. *Ibid.* 165, 177.

[5] Mead to Stuteville, June 9, 1627. "The gentlemen in prison have no hope of relief." ——— to Mead, June 30. "Knightley was threatened by their Lordships with 7 years more imprisonment if he would not yield to the loan." *Ibid.* 239, 249.

[6] Sir Thomas Darnel, Sir John Corbet, Sir Walter Erle, Sir John Heveningham, and Sir Edmund Hampden.

[7] It must be borne in mind that at this time there was no habeas corpus law. The writ was not one of right but of grace. For the origin of the writ see Edward Jenks, "The Story of the Habeas Corpus," *Law Quarterly Review* 18:64-77. One has only to turn to some of the older historians in order to appreciate Professor Jenks's study. Hallam states: "The writ of habeas corpus has always been a matter of right" (*Constitutional History* 1:235). Until one gets away from that idea, he is in no position to understand either the Five Knights' Case or the Resolution of the Judges in 34 Eliz.

[8] Cobbett, *State Trials* 3:4.

[9] Pory to Mead, November 2. *Court and Times* 1:280. See also Beaulieu to Pickering, November 28, *ibid.* 294.

writ of habeas corpus was determined upon. By stating simply, without any extenuating circumstances, that the parties were committed by the special command of the King, the judges could prevent any discussion of the question whether refusing the loan was a legal cause for commitment. Whether the judges expected that a fight would be made on the bigger issue, it is impossible to say. They may have thought that their statement of the issue would stop the suit entirely, as it did that of one of the prisoners, Darnel, who was so staggered by the return that he refused to plead.[10] But it did not daunt the others. For counsel they had some of the best lawyers of the time, Selden, Noy, Bramston, and Calthrop. These men made the issue very plain. They maintained that according to the law any person committed by the King or Council without cause shown should be bailed.[11] Attorney Heath was equally positive that the law showed he should be kept in prison until the King was ready to bring him to trial. The arguments presented on both sides were the same as those which were later elaborated by the Commons and presented before the Lords. There the discussion was as purely judicial as at the trial; it was, in fact, but the case argued over again in Parliament. The reasons for taking up the case in Parliament are to be found in the supposed and real nature of the judges' award at the time of the trial. This award becomes then the key to the situation. Only by understanding that can one understand why the subject of arbitrary imprisonment became the great bone of contention in this Parliament.

There were three awards that could be made by the judges upon the return to the writ of habeas corpus when the prisoner sued to be bailed.[12] If the prisoner was to be allowed bail the entry was *committitur Marescallo, et postea traditur in Ballium.* If he was ordered back to prison, there to remain until brought to trial, the entry was *remittitur quousque secundum legem deliberatus fuerit*, or, as it was more frequently entered, *remittitur quousque*, etc. These were both final judgments; but there was another award which was not final. "If the judges doubt," to use the words of Selden, "only whether in law they ought to take him [the prisoner] from the prison whence he came, or give day to the keeper of the prison to amend his return (as oft they do), then they remand him only during the time of their debate, or until the keeper of the prison have amended his return; and the entry upon that is *remittitur* only, or *remittitur Prisonae*

[10] *State Trials* 3:4-5.

[11] By standing for trial instead of delivery, the lawyers avoided the extreme position. Heath claimed later, however, that in doing so they implied a contradiction, bail being a kind of imprisonment. The answer to this is summed up by Grosvenor in very concise terms. "The judges want noe respect to the Kinge: [they] will not deliver the party but byle him, that it may bee examined whether the King hath more busines agaynst him or not" (G, 2:46). The lawyers, and later the Commons, were not fighting so much for a principle as for a practical means of keeping men from confinement.

[12] This explanation is taken from that of Selden, made before the Lords. L.J. 3:723.

praedictae, without any more. And so," adds Selden by way of explanation, "*remittitur* generally is of far less moment in the award upon the habeas corpus, than *remittitur quousque*, etc."

At the trial, Chief Justice Hyde made the award in these words: "We cannot deliver you, but you must be remanded."[13] At the time, this was taken as a final judgment. "A man committed for some cause expressed, though a great one, may be bailable," commented a letter-writer, "but if the cause be unexpressed, he shall be unbailable. . . . The gentlemen are remanded to prison and there like to lie by it."[14] Another letter-writer interpreted the award as approving of all the late imprisonments for the loan. "His Majesty had full right and authority to proceed as he had done . . . and that all the remedy that the subjects had therein was to have recourse to his majesty's clemency."[15] This was, indeed, the common notion.[16] It was this notion that made arbitrary imprisonment the great grievance of the coming Parliament. "Arguments were made and judgment given," said Selden.[17] "I am ashamed of the judgment," said Phelips.[18] To both these men the crying shame was that the issue had not been treated with the seriousness that it deserved. "Although Acts of Parliament were alleged," complained Selden, "no notice was taken." Phelips protested that "this great liberty had not so serious a treaty as is usually afforded to the meanest piece of ground or cottage."[19] Both these comments show that these men considered that the award was a final judgment.

The first explanation as to the real nature of the award came from Solicitor Shelton. The judgment, he asserted, "was not to authorize their imprisonment, but that the court would take further time to advise of it."[20] He was upheld in this view by Hakewill who declared that "the judges had given not a judgment, but an award, or rather a rule, about the habeas corpus, and that the gentlemen might have sued out another habeas corpus the next day."[21] By "a rule" he meant, as the judges explained later, that whenever the return showed no special cause, but only the command of the King, the case must be held for advisement. This was established by precedent.[22] But in making his explanation, Shelton in-

[13] *State Trials* 3:59. [14] ——— to Mead, November 30, 1627. *Court and Times* 1:295.

[15] Beaulieu to Pickering, November 28, 1627. *Ibid.* 294.

[16] Solicitor Shelton complained in the House that "it hath been taken up in the London streets that the king may commit one for not loaning money." M, 43 *verso*.

[17] B, 16. [18] *Ibid.* [19] *Ibid.* [20] H, 2313:14. See also B, 24 *verso*.

[21] H, 2313:26. See also M, 49, or (for the same account) *State Trials* 3:76.

[22] Whitelocke. "I did never see nor know by any record that upon such a return as this, a man was bayled, the King not first consulted." E.P.,147-148.

Jones. "Persons committed by the King, or Council were never bayled, but his pleasure was first known." *Ibid.* 148.

Hyde. "We do never bayl any committed by the King, or his Council, till his pleasure be first known." *Ibid.* 150.

troduced a new complication. "The judgment," he said, "was *remittitur quousque* etc." Selden and Coke took this up. "I heard heare a *quousque*," said Selden, "and thers nothing but a *remittitur*, the course of the officer is to enter *quousque* etc. that is till they bee delivered by law, this is the judgment that cann bee."[23] The effect of this was to raise the fear that a final judgment had been made. And so when later a subcommittee was appointed to search for records and precedents, they did not fail to inspect the entry for the recent case. Selden reported, however, that they "found only a *remittitur*,"[24] with a space left for the entry of the final judgment.[25] This examination of the entry was conclusive proof as to the nature of the first award. The question was never raised again.[26] The blame for the misconception was laid to "vulgar opinion, raised out of the flame of the late judgment."[27]

But though this investigation had quieted one fear, it raised an even greater one. In the same report Selden told how, from another source, he had found a draft of the entry for the final judgment.

Before this Shelton had, in the House, twitted Selden about the precedents at the trial which were not "rightly put."[28] He glibly offered precedents in support of the other side, boasting that he could bring in forty at least.[29] Wandesford took it up and moved that the Solicitor produce his books if he could;[30] hence Mr. Solicitor appeared at the meeting of Selden's subcommittee for searching records and presented his notes. With this introduction it is possible to give that part of Selden's report

[23] M, 47-47 *verso*. H, 2313:20 adds: "that *remittitur quousque* is as well for treason, fellony etc." For Selden see also above p. 3. "What means this *quousque!*" asked Sir Edward, "*A curia advisari vult!* no it is *donec secundum legem et curiam determinetur.*" B, 31.

The interpretation of *quousque* remained a subject of dispute. Later when the question was submitted to the judges they declared that *remittitur*, *remittitur* etc., and *remittitur quousque* etc., all tended to the same end, that is to a *curia adversari vult*. L.J. 3:740. This is evidently the interpretation of two of the reporters of this Session as seen in their version of Browne's speech on March 28.

"The judgment was *remittitur quousque*." H, 2313:19.

"None of the judges gave sentence definitely." B, 28.

That it was for advisement. M, 47.

[24] M, 50 *verso*-51. That is that the case was held for advisement.

[25] Mead to Stuteville, April 12. *Court and Times*. 1:336.

[26] The question may well be asked, why was not the real nature of the decision known sooner? There is not sufficient evidence on which to base a really satisfactory answer, but some things we do know. It was not an age of publicity. At every turn one is surprised at the lack of information on the part of even members of Parliament. The whole debate leading up to the First Remonstrance presented to the King in June, 1628 is a proof of this; an especially good example being the ignorance regarding the issue of the commission for an excise. Even Selden, who was one of the lawyers for the defence, had not been able to view the record for the judges' award until as chairman of the subcommittee for search he was given power to do so by the House (B, 29). Though the Judges in April freely asserted that the prisoners might have had another writ the next day, one can hardly conceive that (Doderidge to the contrary, E.P., 149) they were anxious that they should have done so. In giving the award Hyde had said, "If you ask me which way you should be delivered, we shall tell you, we must not counsel you." Darnel's fear is sufficient to show the audacity of the other men in continuing the trial. Is it to be wondered that they feared to renew the fight? They looked forward rather to a Parliament where, protected by privilege, the subject could be freely discussed.

[27] Selden on April 9. L.J. 3:723. [28] B, 24 *verso*. [29] B, 31 *verso*. [30] B, 32.

which concerned the late case, in the words of the news-writer. "Hee [Selden] remembred the house of Mr. Sollicitor's intimation that he had 40 cases to this effect makeing for the Kinge; hee sayes that Mr. Sollicitor brought a Booke, but not any case more, to the Subcommitty with the notes of students quight mistaken. But hee mutch commended the Ingenuity of Mr. Sollicitor that brought to the subcommitty the case of Sir John Henningham[31] in a copy of a record of judgment, who beinge committed as you knowe *per mandatum regis* the words are, *ideo praedictus Johannes remittitur*, not mentioning any other cause; hee shewed the copy and it was full of blancks, the beginninge was confessed to bee written by the Clerke, the latter ende by an other hande, and so foisted in, and certainly intended to have binne recorded and the blancks filled up."[32]

Selden read to the House not only the words quoted above but the complete text of the judgment.[33] It followed the usual form of a judgment made after the case had been held for advisement and deliberation;[34] and declared that, according to the records and precedents, the prisoner, because he was detained by the special command of the King, should be remanded "*quousque* etc." that is until he should be liberated according to law.

As might have been expected, when Selden had finished his report the impulsive Phelips was the first one on his feet. "I have heard many arguments used to qualifie that judgment," said he, "and that it was noe judgment. I believed them because I remembred the merit of those judges that gave it, but if this record be true, and the act of the Court, give me leave to say it takes away all qualification, it determines the question against us for ever and ever. I hope that it was the draught but of some man that desired to strike us all from our liberties; I hope the judges justly refused it. But if the judges did intend it, wee sitt not here to answer the trust wee are sent for if wee present them not to his Majestie to bee punished." He moved that it be further investigated by the Committee, which was so ordered.[35]

Shelton was ready and willing to explain his part in the proceeding. He said that he found the draft among his papers, and supposed that it had come from Mr. Kelyng.[36] So when, on comparing it with former

[31] One of the five knights who was granted the writ of habeas corpus.

[32] B, 33 *verso*.

[33] M, 51. The Latin text found there has suffered from having been copied by ignorant clerks. For a correct copy see L.J. 3:727. Translated it reads as follows: The aforesaid return having been seen as well as the diverse ancient records on file in the court which concern similar cases, and mature deliberation already having been held concerning the matter; for this reason, namely that no special cause of arrest or detention for the aforesaid John is expressed but that in general terms he is detained in the said prison by the special command of the lord King: therefore the said John is remanded to the said keeper of the said marshall's prison to be kept safely until etc.

[34] Selden, L.J. 3:727. [35] M, 51.

[36] Mr. Kelyng was the secretary of the Crown Office. L.J. 3:734.

records, he found there was no precedent to warrant it, he naturally sent to Mr. Kelyng to inquire about it. Mr. Kelyng was out of town; hence he spoke to Attorney Heath about it, who said that he had sent it to him. Shelton told Heath that it was not entered but that there was to be another entry, and asked why it was not entered. The attorney's answer was very evasive. "Hee told mee," said the Solicitor, "that hee observed severall entries and hee said that hee gave direction to draw a forme of a judgment, and thereuppon it was brought him but noe use was intended to be made of it any further."[37]

Sir Edward Coke was positive that the meeting of Parliament was all that had prevented the entry of the judgment. He was confident that it was the work of Mr. Attorney, for no clerk could have drawn it except according to a precedent.[38] Eliot agreed with Coke that but for Parliament it would have been entered.[39] Selden went even further. He not only believed that the order would have been recorded but for Parliament, but "I do believe," said he, "that it will be recorded yet so soone as the Parliament arises, if it be not prevented."[40]

The next day Selden was ready to report further particulars about the copy of the judgment. Mr. Kelyng had appeared before the subcommittee where he told a very straightforward tale. He said that after the Michaelmas term the Attorney wished him to make a special entry for the habeas corpus case. He protested that it could only be entered in the ordinary way. But after persuasion he consented that if Heath would draw a note according to which he should make the draft, and if the judges would all consent to it, then he would enter it. The attorney drew the note and Kelyng took it to the judges; they, however, refused to allow any special entry. "But the Attorney diverse times sent to him and told him there was no remedie, but hee must drawe it."[41] "And on the 5 of March hee professed plainly it went against his conscience, yet still exceedingly pressed in the ende a draught was made by one Register Harvey and sent to Mr. Atturney."[42] He had not heard from it since. "And as touching the entrie of the Rolls hee said hee wondered that there was no entrie, but there is an entrie to be made and it useth to bee made before this time."[43]

The matter was referred back again to the subcommittee; but no further mention was made of it until Selden brought it up at the conference with the Lords on April 7. It was due, however, to the feeling aroused by the discovery of Heath's draft, to the fear that this entry might still be made, that the Commons made their resolutions of April 1 as

[37] M, 51 *verso*. See also B, 34, and H, 2313:40.
[38] M, 52; B, 34 *verso*. [39] M, 52.
[40] B, 34, *verso*. [41] M, 55 *verso*. [42] B, 35 *verso*.
[43] M, 56. For Kelyng's testimony see also H, 2313:41.

strong as they did. They declared then that no man ought to be committed without the cause being shown; if any were so committed, he should be granted a habeas corpus; and if the return failed to show the special cause, he should be bailed or delivered.[44] At the conference with the Lords after reading the draft of the judgment Selden said: "If that court, which is the highest for ordinary justice, cannot deliver him *secundum legem*; what law is there (I beseech you, my Lords) that can be sought for in any inferior court for his delivery? Therefore, what can the judgment with *quousque* mean, but plainly a perpetual imprisonment awarded by the court: Now, my Lords, because this draught, if it were entered into the roll (as it was prepared for no other purpose), would be as great a declaration contrary to the many Acts of Parliament already cited, and contrary to all precedents of former times, and to all reason of law, to the utter subversion of the chiefest liberty and right belonging to every freeman of the kingdom; and for that especially also it supposes that divers ancient records have been looked into by the court in like cases; and that, by those records, their judgments were directed; whereas, in truth, there is not one record at all extant that, with any colour, . . . warrants the judgment; therefore the House of Commons thought fit also that I should, with the rest that hath been said, shew this draught also to your lordships."[45]

On the same day that the arguments of the Commons given at the conference were formally reported in the upper House, the Lords agreed to hear the Kings' counsel.[46] Most of the 12th was taken up with Heath's answer to the Commons. Though Heath was ordered to put what he had said in writing,[47] it was not entered in the *Journal*. It was probably similar to his arguments presented in the conferences of April 16 and 17; one might infer that that was the reason it was omitted from the records were it not for the fact that in the report of the conference made by the Lord Keeper to the Lords that part concerning the draft of a final judgment is slurred over with the few words that "it was to the same effect that he had spoken to your Lordships in the House before."[48] It is evident that the Lords desired no record to be kept of what Heath had said on this point, conclusive proof that they did not endorse it.

On the 14th, the judges were called before the Lords to explain their award. Of this the Lords allowed only a formal summary to be recorded.[49] What the judges said agreed with Kelyng's testimony; they had all refused to allow the attorney's draft to be entered as the final judgment. They seemed to have no intention of making any final judgment.[50] The

[44] For the full text of the resolutions with the variant readings see Appendix A.

[45] L.J. 3:727. [46] *Ibid.*, 732. [47] *Ibid.*, 737.

[48] *Ibid.*, 752. Unfortunately none of the reporters for the Commons touched upon this subject.

[49] E.P., 147. This is obvious from a comparison of the answer as given in the *Ephemeris Parliamentaria*, 147-154. [50] As given by Nicholas, "there was no entry made or to be made." p. 83.

prisoners had long before been delivered by command of the King and the particular need for the decision was past. The prisoners could, the judges had said, have had a new writ the next day and so have forced the issue. "I wish they had," declared one judge, "because it may be they had seen more, and we had been eased of a great labor."[51] As to what they would have seen we are left entirely in the dark.

This investigation cleared up more than one doubtful point. In the first place it settled, beyond all question, the nature of the judges' award at the time of the trial. Never again would the men of that time consider it as a final judgment.[52] In the second place it proved that the position taken by Heath was contrary to precedent. The words of the draft expressed exactly what he had contended for at the trial as being according to law. Yet he found it necessary to make a new form. "When the Attorney upon the *remittitur* pressed an entry," said one judge, "we all straitly charged the Clark that he should make no other entry then such as our predecessors had usually made in like cases."[53] Thirdly, it showed that the judges had not adopted "Heath's view of the statutes and precedents."[54] It also makes certain what one long before suspected, that the issue was not introduced solely to evade questioning the legality of the loans; Heath had seen the advantage of having the issue of imprisonment settled in the King's favor. One may even believe that he had forced the issue for his own ends, that otherwise he would not have given it so much of his personal attention.[55] It was, undoubtedly, a great relief to the Commons to find that the judges had resisted the pressure put upon them by the attorney; yet there were some who felt that in

[51] Doderidge, E.P , 149.

[52] Unfortunately it did not clear it up for the historians who have written on this subject, not one of whom has made a clear statement of the real nature of the award. This is more inexcusable in Gardiner than in the others for he had access to all the evidence necessary in order to make such an explanation. It convinces one of what was strongly suspected before, that he made but little use of the *Lords' Journal*. The old *Parliamentary History*, on which most of the earlier historians had been forced to depend, omits this part of Selden's argument. But with the *Journal*, the full *True Relation* (Harl. 4771), and Harl. 2313, there seems no excuse for Gardiner's omitting entirely this investigation. He does give an extract from Whitelocke's examination by the Lords (*History of England 1603-1642*, 6:216 n.) taken from Rushworth, but his comment only proves his woeful ignorance on the point at issue. Of the award itself he says that "the judges took a middle course" (6:216), which is perfectly true. But to him their middle course consisted in refusing "to have any evidence on the records of the Court that they held that the Crown might persistently refuse to show cause" (6:217), not that they refused to make any such judgment. In another place Gardiner commits himself even further. He states that according to that decision "the judges ought to await the king's announcement of the cause, however long it might suit him to withhold it" (6:295).

[53] E.P., 149.

[54] Gardiner says that their judgment proved they had (6:216-217). Heath's draft is, indeed, in exact accord with the accepted view of the judgment. If any further proof is needed that that view is wrong, it is surely to be found in the judges' rejection of this proposed entry.

[55] In reporting the conference of April 16-17 to the Commons, Sir Edward Coke said, "I told the Lords there were symtoms in every sicknes, and that the Attorney to bother to care the busines was a good signe." G, 2:47.

evading the subject they had shirked their duty.[56] The feeling on both sides was that after such a thorough discussion the question must be settled one way or the other;[57] and since the judges had failed, the settlement must be made by Parliament.

[56] "The judges have not disclaimed it, that they could not be bailed," said Coke. H, 2313:133.

[57] "I wish with all my heart," Heath had said at the conference, "that . . . a fitting bill might be preferred to compose and to settle well and equally this great question." L. J. 3:756.

CHAPTER II

STATUTES, PRECEDENTS, AND RECORDS

It is not difficult to surmise why the judges drew back from making a final decision, for no authority bearing directly on the issue before them could be found in statute, precedent, or record. As to what the issue was, no one was left in doubt. Sir Edward Coke had indeed attempted to prove that any commitment by the special command of the King was against the law,[1] but the fact that such arguments were made so little of, shows how aside they were from the real question. The direct issue was whether, when a man was committed by command of the King or Council without any cause being shown, the judges should bail or remand him. The Commons maintained that he should be bailed, the King's counsel that he should be remanded.

The written law on which the Commons ultimately based all their claims was the familiar clause of Magna Carta, *Nullus liber homo . . . imprisonetur . . . nisi per . . . legem terrae.* From this clause they drew two arguments; the one based on a general interpretation, the other on a particular. The general interpretation was that no free man should suffer the punishment of imprisonment without having first been condemned by due process of law. On this interpretation there was no difference of opinion. The task that the Commons' lawyers had before them was to prove that this interpretation had direct application to the case at issue. "If the law be that upon this return the gentleman should be remanded," argued Bramston at the trial, "then this imprisonment shall not continue on for a time, but for ever; . . . and by law there can be no remedy for the subject: and therefore this return cannot stand with the laws of the realm or that of Magna Charta. . . . And if they sue out a writ of Habeas Corpus, it is but making a new warrant, and they shall be remanded and shall never have the advantage of the laws."[2] It is the same plea that is made in the Petition itself. "Against the tenor of the said statutes . . . divers of your subjects . . . were returned back to several prisons without being charged with anything to which they might make answere according to the law." Under such a commitment the prisoner had no legal means of bringing his case to trial; unless released on bail, he must stay in prison during the King's pleasure, which was

[1] "The Kinge in his presence can not cause any man to bee arrested, but an action lyes against him that arrests him. 1 Hen. 7 . . . Ed: the 4th. was told hee could not committ for if you doo it falsly, the party greived hath no remedy." B, 17.

Cresswell brought up the same precedent. "And Hussey, Chief Justice in 1. Hen. VII, fol. 4 saith, That Sir John Markham told King Edward IV he could not arrest a man . . . " O.P.H. 7:382.

[2] *State Trials* 3:8.

clearly against the clause in Magna Carta. It is evident that some at least of the judges were impressed with this argument for Jones demanded of Attorney Heath that he explain how the prisoners could ever be delivered, if not by that court, and Doderidge asserted that, unless delivered by that court, there was nothing ahead of them but perpetual imprisonment.[3] To the general interpretation of the clause Heath agreed. "If a man shall be imprisoned without due process, and never be brought to answer, that is unjust and forbidden."[4] But because that was a possible consequence of commitment without cause shown it did not make the commitment itself against the law. He illustrated by showing that any discretionary power lodged in the King could be used by him to the detriment of the subjects, yet they would not for that reason argue that all power be taken from him. The question reduced itself ultimately to a trust in the King without which, according to Heath, there could be no monarchy. Since the general interpretation would not avail, the Commons were forced back on their second interpretation, the technical meaning of *legem terrae*.

This, as well as the first argument, had been used at the trial. It was not heard as often in the lower House where the lawyers' efforts had been devoted, as Littleton explained, "to the end that no scruple might remain in any man's breast unsatisfied."[5] But in the conference with the Lords it was fully elaborated. The first step in the argument was to prove that in the time of Edward III, "law of the land" was interpreted by "due process of law." For this they cited 28 E. III, c. 3, which is given in the Petition, showing by comparison with 5 E. III, c. 9 and 25 E. III, c. 4 that the phrases were used interchangeably. The second step was to prove that "process of law" covered the indictment as well as the trial. Littleton quoted again from 25 E. III, c. 4 "that from henceforth none shall be taken . . . unless it be by indictment, or presentment . . . or by process made by Writ Original,"[6] and from 42 E. III, c. 3 "that no man be put to answer without presentment . . . or by due process and Writ Original."[7] Heath was quick to point out where this narrow reasoning was leading them. "Will they have it understood that no man should be committed, but first he shall be indicted or presented? I think that no learned man will offer that; for certainly there is no justice of the peace in a county, nor constable within a town, but he doth otherwise."[8] Practice proved, he insisted later, that these laws did not refer to the "first commitment or putting into safe custody" but to "a legal proceeding to judgment or condemnation."[9] Heath was in this simply carrying the Commons' argument to the extreme in order to show its absurdity. The purpose of Littleton had been only to maintain that all commitments must

[3] *Ibid.*, 31-32. [4] *Ibid.*, 39.
[5] L.J. 3:718. [6] *Ibid.*, 719. [7] *Ibid.*, 720.
[8] *State Trials* 3:38. Heath had deliberately substituted arrest for indictment. [9] L.J. 3:754.

follow the regular order of the courts where, in every case, the written indictment showed the cause.[10] That commitment by special command was not included within this regular procedure they brought statutes to prove. In 36 E. III, Rot. Parl. no. 9, the King promised not to make any arrest contrary to the Great Charter "by special command." In no. 20 of the same roll the King is asked to deliver those "taken by special command against the form of the charters." But a careful reading of these petitions convinces one that Heath had right on his side when he said that they "were made for redress of inconveniences happening to the subject by the suggestion or information of parties."[11] Littleton insinuated that the same was still true. "Kings seldom do those things merely of themselves, but as things proceed from some man's suggestion."[12] All of which might be perfectly true, but it did not make those particular laws applicable to commitment by the King or Council. None of the laws quoted bore directly on the point at issue. The Commons admitted as much when later on they were asked whether they would be content with a bare confirmation of the laws. Speaking of their first resolution Sir Edward Coke said: "The Acts of Parliament include this question in substance but it is only implied."[13] And Littleton who had claimed so much for the statutes in his arguments before the Lords, and who was appealed to as the authority on statute law, then admitted that no layman could possibly draw out their resolutions from those statutes.[14]

Attorney Heath failed just as completely as Littleton had failed, when he attempted to prove that Westminster the First, c. 15, and not the statutes of Edward III, was the real interpretation of the particular clause in Magna Carta. That statute restricted the right of the sheriffs to bail. In doing so it enumerated the four cases which under the common law were not replevisable; "those that were taken for the death of a man, or by the commandment of the King, or of his justices, or for the forest."[15] At the trial Heath admitted that this law "was especially for direction to the sheriffs and others; but to say courts of justice are excluded from this statute I conceive it cannot be."[16] Later he stated his position more fully. The statute states, he explained, what was the common law before the time of Magna Carta. Magna Carta does not alter it. Then he went on, "this statute . . . doth not recite that these four sorts were not

[10] Sir Mathew Hale (2:130) shows clearly the way in which in the seventeenth century a man might be taken by command of the King. "It must be done by some order, writ, or precept, or process of some of his courts." The argument of the Commons was this: If the King's writ could not imprison the subject unless it contained the cause, why should the King's warrant? (See Cresswell, O.P.H. 7:383; and Whistler, M, 45 *verso*). If the warrant showed the cause the two would be essentially the same.

[11] L.J. 746. That is, this form of commitment was being used for the benefit of private persons who should have proceeded according to the regular order of the courts.

[12] *Ibid.* 747. [13] M, 138. [14] N, 141-142; H, 5324:23; G, 3:60-61.

[15] L.J., 3:720. [16] *State Trials* 3:41.

replevisable by the sheriffs but generally that they were not replevisable at all."[17] His contention was that at the time of this statute it was recognized that according to the common law these four cases were not bailable[18] by the judges.[19] The Commons came back at Heath with the same kind of argument he had used against their interpretation of the statutes of Edward III. They showed that such an explanation was contrary to practice. Right along men who had committed murder were bailed by the King's bench. "Good Lord!" ejaculated old Sir Edward Coke, "it is done every day."[20]

Even though the Commons were so positive in their assertion that this statute was not to the question, for it could not tie the judges, they were somewhat worried that so eminent an authority as Stamford was against them. At the trial Heath had supported his opinion by that of the learned judge of Queen Mary's time. He quoted from his book, *Pleas of the Crown*, fol. 72: "by this [Statute of Westminster First] it appears, that in four cases at the common law a man is not replevisable."[21] It was some time before any one questioned Heath's interpretation of Stamford. It was not, indeed, Heath's interpretation at all, but the accepted explanation of that time; the Commons freely admitted that Stamford was against them.[22] Shelton forced Sir Edward Coke to a confession that it was only recently that the old judge had even admitted that Stamford was wrong. He cited a decision made by Coke and the judges associated with him in

[17] L.J. 3:754.

[18] It is not necessary here to discuss the difference between replevy and bail, for it does not affect the question involved.

[19] Professor Jenks has unnecessarily confused the issue for the modern student. In his article *The Story of the Habeas Corpus* he states that the right to bail rested with the judges as justices of the peace not as justices of the King's bench, when their business was not to bail but to try. Then he goes on to show how this power was expressly limited by statute, how in the time of Richard III and Mary the provisions of Westminster First were reënacted with order for their strict observance by the justices of the peace. Heath's silence on this point is alone enough to prove it a mistaken view. One can not doubt that he not only knew the whole law on this subject but that he was stretching it as far as possible. Bailing by the justices of the peace (who replaced the sheriffs) and bailing by the judges were two distinct acts. At the time of commitment the justice could either put the party in prison to await trial or leave him at large on bail. But the man who was imprisoned by the justice had still the opportunity to bring his case before the judges by applying for the proper writ, of which the habeas corpus was one. Upon the return of this writ stating the cause of the commitment the judges were to decide whether the prisoner should be delivered, bailed, or remanded. It was in the nature of an appeal to a higher court on the validity of the imprisonment. This view is confirmed by Sir Mathew Hale who writing in the seventeenth century shows how clearly distinct were the two processes. "If he be bailed by a justice of peace before commitment, or if committed and brought into the court of King's bench or sessions to be bailed" (2:126). The King's bench, he explained later, had an original power to bail. That is it was not conferred upon it by statute, and it was not limited unless such limitation was explicitly stated by law. Sir James Fitzjames Stephen makes this very clear when he says: "The power of the superior courts to bail in all cases whatever, even high-treason, has no history. I do not know, indeed, that it has ever been disputed or modified. It exists in the present day precisely as it has always existed from the earliest times. The only matters connected with it which need to be noticed here are some provisions of the Habeas Corpus Act of 1679" (1:243). The power was disputed by Heath in 1628, but not at all as Professor Jenks disputes it in his article.

[20] L.J. 3:729. For the same thought expressed by Littleton see *Ibid.*, 721; by Selden, *State Trials* 3:80.

[21] *State Trials* 3:43.

[22] See Cresswell on March 22 (B, 23 *verso*); Selden on the 27th (*State Trials* 3:80); and Sir Edward

13 James, that it was fit the cause should not be shown that being the custom of all antiquity. "And Sir Ed. Coke sayd," went on Mr. Solicitor, "that if the privy Councell committed any, hee is not baillable by any court of England" and so the prisoners were returned. In that time "in what esteeme was Stamford! But now *O tempora, O mores.*"[23] There is no doubt that Coke was very much disconcerted, as his immediate reply showed, but at their next meeting he was able to make a fitting answer. "I spake against the lones and this imprisonment," said he, "and I looked for a bang for my pains. What if wee remand or remitt a man, What is that to acts of Parliament. . . . I confess I was for Stamford and cited him, But when I saw some of this house puld out and sent to the Tower, I sett myselfe to my studdy, and found I had followed a blinde guide, And now the witt of man can not deceive mee as I have shewde you heretofore in what I have sayd and cited."[24] He believed that they should overrule Stamford's opinion. But that Stamford's opinion was against them he did not question.

It was not until April first, when the whole subject was being drawn to a conclusion in the House, that any other interpretation of Stamford was advanced. That day Rolle brought into the House a copy of the *Pleas of the Crown*.[25] "It was said," he began, "that Stamford's opinion is agreeable to the late judgment. I will cleere him allso, for hee sayes no sutch matter."[26] Then he read from the book, "and as to the command of the justices, that is meant their absolute commandment: for if it be their ordinary commandment, he is replevishable by the sheriff, if it be not in some of the causes prohibited by the statute."[27] Littleton explained later that if replevisable here was limited to the sheriff, then it was throughout the whole passage, and so Stamford had said nothing at all as to whether the parties were bailable by the judges.[28] Equally with the Commons, Heath had failed to prove his point by statute.[29]

Coke on the 29th. "If the King had such a prerogative and no authority but one judge only in Queen Marys time, shall that overrule us?" (B, 31).

Believing as they did that, according to Stamford, in these four cases no one was bailable by either justice or judge, the Commons attempted to explain what was meant by "command of the King." Bramston maintained that it meant when men were taken by the King's writs and not by word of mouth (*State Trials* 3:8). But Mr. Solicitor pointed out in the House, as can easily be seen from reading Stamford, that by command of the King is understood "by the King's person or his Counsell his representative person" (H, 2313:14). He supported Stamford in this by reference to Fitzherbert and Dyer who were of the same opinion as to the meaning of "command of the king."

[23] B, 31 *verso*-32. [24] B, 34 *verso*.

[25] B, 36 *verso*. It comes as a surprise to the modern student to find that these eminent lawyers had depended so upon the traditional interpretation, that they had not gone immediately to the book itself. We must remember, however, that even printed books were not easily accessible. A further example of the same kind of thing is to be seen in the interpretation of the judges' resolution in 34 Eliz. See below pp. 16-17.

[26] *Ibid.* M, 57. [27] L.J. 3:721. [28] *Ibid.*

[29] In this connection it is interesting to note Heath's statement of a year later. "It is true that this opinion is grounded upon West. 1, c. 15, but I will not insist upon it. But the constant opinion has always been, that a man committed by the command of the king is not bailable." *State Trials* 3:282.

Nor were either the Commons or Heath to have any better success with precedents. They were freely quoted at the trial, in the House, and at the conferences. The trouble with each and all of them was that the decision was not based on the straight issue but on the conditions surrounding the particular case. The lawyers quoted cases where, though, according to the legal procedure, the special command was the only cause shown, yet the real causes were known to the judges and determined their decision. For this reason Chief Justice Hyde threw out the precedents quoted at the trial. He showed that either the cause was known or else there were letters from the King or Council by virtue of which the parties were bailed. Selden claimed that "those letters were not considerable."[30] And when a particular case was cited during the time that Coke was judge and letters came to bail, he explained, "I bayled him not by letters but by lawe. Those great mens letters were no letters of justice to mee, I meane hinderers of justice."[31] Nor were the precedents cited on the other side any more convincing. Hyde summed up the whole matter of precedents when he said, "our predecessors have done as we have done, sometimes bailing, sometimes remitting, sometimes discharging."[32] The most that could be claimed from the precedents was that persons committed by the King "were never bailed, but his pleasure was first known." Under this the judges could hold the case for advisement. All this but admitted that in each case the particular circumstances were known and were made the issue; that never before were the judges required to make the decision that they were called upon to make in the Five Knights' Case. "It remains to take away the mist of precedents in printe," said one lawyer; "many committed by commission, but none *sine causa*; this commitment is a novelist."[33] There was no precedent which bore directly on the point at issue.

All that remained on which to base a decision was the record of the judges' opinions in the past. Of these the most important, the only one indeed of any weight, was that of the judges in 34 Eliz. It was first brought up by Heath at the trial to prove that the prisoners should not be bailed. Heath admitted that he had not the record with him, that he quoted from memory; but that his authority was "the book of the lord Anderson, written with his own hand."[34] It is necessary to give his account in full in order to note how he garbled it. "The judges were desired to shew in what cases men that were committed were not bailable, whether upon the commitment of the queen or any other. The judges make answer, That if a man shall be committed by the queen, by her command, or by the privy council, he is not bailable."[35] In the confer-

[30] H, 2313:14. "*considerable*" here means *to be considered.* [31] B, 31.
[32] E. P. 150. [33] Saunders, B, 30. [34] *State Trials* 3:44. [35] *Ibid.*, 43-44.

ence before the Lords, Selden read the resolution from Anderson's report,[36] in order that they might all perceive that it was not concerned with the question of bailing as the attorney had alleged.[37]

"And where it pleased your Lordships to will divers of us to set down in what cases a prisoner sent to custody by Her Majesty, Her Council, or some one or two of them, are to be detained in prison, and not delivered by Her Majesty's Courts or Judges, we think that if any person be committed by Her Majesty's commandment from her person, or by order from the Council Board, or if any one or two of her Council commit one for high treason, such persons, so in the case before committed, may not be delivered by any of the courts without due trial by the law, and judgement of acquittal had."[38]

The attorney had changed the word *delivered* to *bailed.* Here again, as in the case of Stamford, he was probably giving the popular interpretation of the time.[39] But Heath's version of the resolution had had no effect upon the award as given by Chief Justice Hyde. He had gone back to the resolution itself, comparing the different copies made at the time. "It is," he said, "to this purpose, that if a man be committed by the commandment of the king, he is not to be delivered by a Habeas Corpus in this court, for we know not the cause of the commitment." Then he went on to declare the award, showing by his phrasing that he based it more on this resolution than all the rest put together. "If in justice we ought to deliver you, we would do it, but upon these grounds, and these records, and the precedents, and resolutions, we cannot deliver you, but you must be remanded."[40] In the light of this award, as revealed by the investigation in Parliament, it is an easy matter to interpret the resolution. That investigation had proved that the judges gave no final

[36] The story of how the Commons came into possession of a copy of Anderson's report bears telling. The validity of Heath's account had been questioned in the House (see Selden H, 2313:14; Whistler B, 27 *verso*; Shervile B, 29 *verso*); and search had been made for a copy of the report. (It must be remembered that at this time the report was only in manuscript.) But on the 30th of March, when Selden made his full report from the committee for searching records, he was obliged to admit that "the judges opinion of the 34th of Q. Eliz. he thought to have had in a booke of Judge Andersons but could not find it" (B, 33 *verso*). Later in the same day Eliot stated that he had Judge Anderson's book in his possession (M, 52). "The book was left," he explained, "by that judge to his sonne, who kept it as a jewell in his chest: and upon the occasion of the late lone, hee sent for the booke to London and made it visible to our eyes, and though he held it as a jewell, yett for this publique use, hee was readye to send for it." M, 56.

[37] "It hath been cited, and was cited, in that great judgment given upon the Habeas Corpus in the King's Bench, as if it had been that upon such commitments the judges might not bail the prisoners; yet it is most plain that, in the resolution itself, no such thing is contained." L.J. 3:728.

[38] 1 Anderson, 298.

[39] See Sir Edward Coke's interpretation which was quoted against him (below p. 21). Coke had admitted in the House that he had Anderson only as reported by a student.

[40] *State Trials* 3:59. Compare this with the concluding part of the Resolution which reads as follows: "Nevertheless the judges may award the Queen's Writs to bring the bodies of such prisoners before them, and if, upon return thereof, the causes of their commitment be certified to the judges as it ought to be, then the judges in the cases before, ought not to deliver him, but to remand the prisoner to the place from whence he came." 1 Anderson, 298.

judgment but instead held the case for advisement. All writers on this subject have agreed that the award and resolution are in perfect accord. 34 Eliz. must mean then that the case be held for advisement.[41] If any further proof were needed, it is to be found in the wording of the resolution which is as follows: "to remand the prisoner to the place from whence he came."[42] What is that but the Latin form *remittitur prisonae praedictae?*

When one considers the circumstances which gave rise to the Resolution of 1592, this interpretation seems the natural one. Men were being imprisoned by the Privy Counsellors without the particular cause being given. By the writ of habeas corpus they were being brought into court and discharged as fast as they were imprisoned.[43] The judges were, therefore, asked whether the prisoners should be delivered without being brought to trial; and the answer was that they should not be delivered without "due trial by law, and judgement of acquittal had." Then descending to the particular case they told how the person could be brought to trial when committed by command of the King and no particular cause stated. When the prisoner was brought into Court by the writ of habeas corpus, he should not be delivered, for then he would not be brought to trial, he should not even be bailed, but held in prison while the judges found out from those who had committed him what the particular cause might be.

But what if the King did not wish to explain the particular cause to the judges? This was the issue presented in 1628. Could the Resolution of 34 Eliz. help to solve that issue? Not at all; like statutes and precedents it must be thrown out as having no bearing on the subject.[44]

[41] There is a striking parallel between the answer of the judges in 1592 and the answer of the judges in 1628 when, before giving his first answer to the Petition, the King put certain questions to them. The second question was as follows: "whether in case a habeas corpus be brought, and a warrant from the King without any general or special cause returned, the judges ought to deliver him before they understood the cause from the King?" Their answer was: "Upon a habeas corpus brought for one committed by the King, if the cause be not specially or generally returned, so as the Court may take knowledge thereof, the party ought by the general rule of the law to be delivered. But if the case be such that the same requireth secrecy and may not presently be disclosed, the Court in discretion may forbear to deliver the prisoner for a convenient time, to the end the Court may be advertised of the truth thereof" (Gardiner 6:295. Quoted from Hargrave MSS 27, fol. 97). In this answer the meaning of *presently* should be noted. In the seventeenth century it was a synonym for present time, *now* (for examples see G, 105, 106; B, 193). Even Gardiner admits here "that the length of the remand was not to depend upon the King's pleasure" (*Ibid*). This makes it very plain that the only object of delay was in order that the judges might find out the special cause. It can not be repeated too often, that before 1627 there had been no thought of deciding any case except by consideration of the special cause.

Heath practically admitted this in the following year when, in again interpreting these resolutions he said: "Upon the whole matter the bailment of these prisoners is left to your discretion." *State Trials* 3:286.

[42] See note 40.

[43] Selden quoted that part of Anderson's report as well as the resolution itself. "Her Majesty's writs have sundry times been directed to divers persons having the custody of such persons unlawfully imprisoned; upon which writs no good or lawful cause of imprisonment hath been returned or certified; whereupon, according to the laws, they have been discharged of their imprisonment." L.J. 3:728. See also Whistler, B, 27 *verso*.

[44] The reason that modern writers have failed to interpret this resolution as Hyde interpreted it is that they have not understood his award in the Five Knights' case. Like the people of that time they

The past could furnish no solution for the problem. This excused the judges for not having made a decision, but it did not lessen the demand for a settlement of the question now that it had been raised. In spite of the fact that they found no support in statute, precedent, or resolution, the Commons were yet confident that they were in the right, for they had still the fundamental law as a basis for argument. Back of all written law was the unwritten law, and this they claimed made for the liberty of the subject. But the King's party was no less confident; they based their claim on the newer belief of divine right. These two beliefs were bound at some time to clash; the clash came in 1628. It was the latter belief which made the abuse; it was the former which made the people declare it to be an abuse of power. More than that the subjects for the first time had in the writ of habeas corpus, which was then rapidly becoming a writ of right, an efficient tool with which to combat the encroachment upon their liberty. It is this conjunction of abuse and remedy which must next be considered.

have been blinded by the popular opinion regarding 31 Eliz. and have thought in both cases that the prisoners were remanded until they should be brought to trial. Hallam says of this resolution that it prevented "the judges from discharging the party from custody either absolutely or upon bail" (1:379). Dubious as Gardiner was as to Anderson's meaning in other respects, he had no doubt but what he meant "that bail ought to be refused to persons so committed, till the time for trial came on" (6:245 n). Professor Crawford says that "it afforded no relief when the commitment was made in consequence of a warrant from the crown or the Privy Council." And then he goes on to show that it was the direct precedent for Hyde's award. Am Law Rev. 42:488.

CHAPTER III

THE CONJUNCTION OF ABUSE AND REMEDY

Statute, precedent, and resolution all alike proved that the direct issue of arbitrary imprisonment had never before been faced. This is not to say that never before had the King committed any one to prison without showing cause, or even that such commitments had been always for matters of state which required secrecy; but only that there was no record in support of, or in protest against, such arbitrary power. The reasons the protest came in 1627 are two: the great abuse of the prerogative aroused a strong feeling of opposition in the lawyers, and the writ of habeas corpus gave them a legal means of combatting the abuse. The desire to curb the King's prerogative was the direct result of imprisonment for refusal to contribute to the loan. No better illustration of this could be desired than is to be found in Sir Edward Coke's change of attitude between 1621 and 1628.

It was to be expected that, in searching for opinions by the judges, the King's counsel would not neglect any that had been made by Sir Edward Coke. It has already been noted how he had had to explain one of his decisions,[1] and also how the Solicitor had caught him on the interpretation of Stamford. It was then that he made his memorable confession explaining how he came to change sides.[2] His change was due entirely to the fact that the power of commitment had been abused. Had it been reserved by the King and Council for only such cases as concerned matters of state, when there was real need of secrecy, the power would not have been questioned. But when matter of state was pretended when there was none, when there was danger that this kind of commitment would become a regular means for carrying on an arbitrary government, it was to be expected that many thoughtful men would change their views. His earlier views are seen most clearly in a debate in the Parliament of 1621, a debate to which Attorney Heath called attention in order again to show that Sir Edward had not always taken the side that he did in 1628. A bill had been introduced "for the better securing of the subjects from wrongful imprisonment, and deprivation of trades and occupations, contrary to the 29th chapter of Magna Charta."[3] The abuse against which the bill was directed was that powerful monopolies, by authority granted them in their charters, were imprisoning men in order to prevent them from carrying on their trades. The bill was thrown out because, as framed, it covered

[1] See above, p. 16.

[2] See above, p. 15.

[3] C.J. 1:596.

commitment by the King and Council. The man who more than any other was responsible for the loss of the bill was Sir Edward. The reasons Heath quoted him as giving at that time were that "there are divers matters of state, which are not to be comprehended in the warrant, for they may be disclosed; one committed by the body of the Council not bailable by law, resolved so by all the judges in Wraye's time (that, my lords, is the resolution of 34 Eliz. when Wray was Chief Justice)."[4] Heath's object in bringing up this debate was probably more to confuse the old judge than for any weight that it would have. Its interest to us is that it shows that prior to 1627 the issue had never presented itself in just the way it did then.

It was such men as Coke who changed their views at this time, not men like Heath. Indeed, the argument used by Sir Edward in 1621 is the same as used later by Heath; namely, that for reasons of state it was often necessary that the cause be kept secret. At the trial, Heath had given examples in support of this reason. In case of a plot when the principals were still at large, it was necessary that the cause be concealed for which the subordinates were committed.[5] This argument was followed up in the House by the King's supporters. Nethersole insisted that for cases of conspiracy there must be such a power;[6] and May,[7] supported by Whitehead,[8] dwelt on the great disorder that would have been caused if, in some cases of which he knew, the cause had been revealed. These arguments had had weight in 1621; but in 1628 the Commons refused to see any such necessity. Noy called attention to the fact that there was no reason why the judges should not be informed for, by their oath, they were not permitted to reveal the secrets of the King.[9] And Sir Edward conceded that if the cause of commitment was of higher nature, as "suspicion of treason, misprison of treason, or felony," the cause need be stated only in general.[10] This would create no inconvenience for, as he asked, "who is there that suspects it not, does not all Cheapside knowe it as one is carried to the Tower?"[11] "The laws of England," said another, "provide sufficiently for the safety of the Kings person."[12] Not only was there no necessity but, as Selden pointed out, "reason of state" was not recognized by the law.[13] To this argument Ashley made answer, but an answer that was repudiated by the Lords; he claimed there was a law

[4] L.J. 3:756. Heath quoted this from his own notes, but it follows very closely the report as given in the Commons' Journal (1:609), and in Nicholas for 1621, 2:26, 109. It is evident from this that Heath kept a diary during that Session. It ought to be found if it is still in existence. Possibly it is his MS to which reference is made in the Commons' Journal (1:526) as being in the Inner Temple Library.

[5] *State Trials* 3:45. [6] M, 46.

[7] B, 34 *verso*; M, 52. [8] M, 56 *verso*. [9] L.J. 3:762.

[10] *Ibid.*, 3:730. [11] B, 30 *verso*. [12] Brown. H, 2313:19.

[13] "In the matter of a law, those points of state are not considerable" (H, 2313:13). "State mee thinks should not alter nor crosse lawe." B, 24.

of state for cases not covered by the common law.[14] Heath maintained that the common law recognized a discretionary power in the King, that the Commons' propositions took away this power, and were, therefore, incompatible with a monarchical form of government. The Commons denied that they took any power from the King; they would not decrease but regulate it. "Whatever the King's power was by the common law," explained Sir Edward, "yet was it qualified by acts of parliament, and no man will deny but the King may limit himself by acts of parliament."[15] At another time he said, "the King hath distributed his judicial power to Courts of Justice."[16] Hakewill had a vivid way of putting it: "the sword is carried before him but the scepter is in his hand."[17] He insisted that the common law recognized no power in the King to punish.

From this debate on the King's prerogative, it is very evident that the Commons based their arguments chiefly on the common law, the unwritten, fundamental law of the land.[18] They used it not alone for refuting an absolute power in the King, but as specific proof against arbitrary imprisonment. Gathering together all the arguments presented by the different men at different times, it is possible to reduce them to four. Three of these were against imprisonment as a punishment when there had been no trial. They correspond to the use made of the general interpretation of the clause in Magna Carta and can be briefly summarized.

In their first argument the lawyers approached the subject from the negative side. They tried to prove that there was no such power in the King because the law did not recognize it. If the power is already in the King, they asked, why do we have statutes allowing such punishment for offences?[19] Carrying the argument a step further, they pointed out that two penalties are recognized by the law as punishment for crime, imprisonment and fine. But the King could not arbitrarily fine a man; it must be done judicially.[20] Why think then that he could arbitrarily imprison him? Another proof presented to show that the law did not rec-

[14] L.J. 3:758.

[15] *Ibid.*, 761. [16] M, 50. [17] M, 49.

[18] See L.J. 3:717-718 for Digges's eulogy on the common law. In his book on *The High Court of Parliament*, Professor McIlwain devotes considerable space to an explanation of the part that the idea of fundamental law played in the legislation of this period. "Men may not always have been clear as to what particular rights or liberties were guaranteed by the fundamental law, but as to the existence of such a law there was no doubt." "Fundamental law," he states in another place, "played its greatest part in the great contest between the Parliament and the Stuarts, which was in its last analysis a struggle of the common law against the king." pp. 63, 75.

Dicey has the same thought in mind when he says: "The security which an Englishman enjoys for personal freedom does not really depend upon or originate in any general proposition contained in any written document. . . . Individual rights are the basis, not the result, of the law of the constitution." *The Law of the Constitution*, 202, 203.

[19] Selden: "To what end were this in an act of parliament, if imprisonment were at the king's will?" *State Trials* 3:79.

[20] As authority for this statement Sir Ed. Coke gave Bracton, 2, fol. 105, and the resolution of all the judges in 3 R, 2 (L.J. 3:730).

ognize this right in the King was the absence of any statutes regulating the power. Wherever the law allowed imprisonment, that imprisonment was limited both as to persons and as to time. There were no statutes limiting this power in the King; therefore if he had the power at all it was a power which could be applied to all his subjects for all time. "To extend an imprisonment without reason," said Coke, "is against reason."[21] To Sir Edward the lack of regulation was conclusive proof that the power was not recognized by the law.

The second argument against arbitrary imprisonment was that according to the common law it made the subjects less than freemen. Imprisonment was a civil death. According to the common law it could be inflicted upon the freeman only by due process of law for having violated the peace, that is for having used force. No freeman, so the lawyers claimed, could be imprisoned for any other offence unless it was explicitly provided for by statute.[22] Moreover, in every case the imprisonment must be for some cause in the person confined, not in the will of him who commits.[23] Not alone would those committed by this arbitrary power suffer from loss of their status as freemen; it would lower the condition of every subject. Arbitrary imprisonment made every man a "tenant at will for his liberty."[24] He was no longer free but a bondman, for he had lost "the sole distinction of a freeman." This was a note that Selden continually harped upon. "Whoever can say I can imprison him, I will say he is my villein."[25] Coke pointed out that such a person was worse than a bondman. He cited "two book cases" to show that a villein could not be imprisoned by his lord without cause shown.[26] This was a line of reasoning well calculated to stir the heart of the average Englishman.

An argument which appealed to a sentiment no less strong was a comparison of the rights granted to the subject by the common law for protection of his person and for protection of his property. No idea was more firmly fixed in the minds of men at that time than the right of the individual to property; it was much stronger than it is to-day. It controlled the theory of taxation. "It is," said Digges, "an undoubted and fundamental point of this so ancient a law of England, that the subjects have a true property in their goods, lands, and possessions: the law preserves as sacred this *meum* and *tuum*, which is the nurse of industry, and mother of courage; for, if no property, no care of defense. Without this *meum* and *tuum*

[21] L.J. 3:730.

[22] See Cresswell's speech, O.P.H. 7:379; and Shervile, M. 48.

[23] Pym. "The motive of the punishment must be in the party offending." B. 118.

[24] L.J. 3:729.

[25] *State Trials* 3:79. See also *Ibid.*, 18. Digges moved that the records be viewed to see "whether this power of the Kinge trenches upon us as Servants or subjects." B. 17 *verso.*

[26] L.J. 3:729. The cases cited were "7 E. 3. fol. 50 in the new, 348 in old print," and "33 E. 3. Tet. Tresh. 253, in faux Imprisonment, Fitz."

there can be neither law nor justice in a kingdom; for this is the proper object of both."[27] But great as was the respect for property, great as was the protection given it by the law; yet greater, so ran the argument, was the protection given to the person. The lawyers gave incident after incident to show that a man was allowed rights for the protection of his body which he was forbidden to use for the safe-keeping of his possessions.

But all of this proof was against arbitrary imprisonment in general. What was needed was proof against imprisonment before trial. The proof of this, Selden explained, lay in the remedies that were provided against false imprisonment.[28] These remedies were the three writs for the enlargement of a freeman falsely imprisoned—*Odio et Atia*, *Homine replegiando*, and *Habeas Corpus*. The first two were directed to the sheriff, and consequently were of no avail when the party had been imprisoned by the command of the King.[29] The writ of habeas corpus was the King's order to the keeper of the prison to bring the prisoner into the Court together with the cause of his commitment or detention, whichever it might be. Upon this return the Court judged the efficiency of the cause.[30] This argument shows how closely bound together were the subjects of arbitrary imprisonment and the writ of habeas corpus. Granted, as the older historians would have us believe, that the writ was at this time one of right, not of grace, and the case for the Commons is greatly strengthened. But if it was only in the process of becoming so the situation is changed. The second of the Commons' resolutions of April 1 is sufficient proof that it was not yet a writ of right.[31] Heath denied that it was even the proper mode of procedure. He claimed at the trial that the prisoners should have petitioned the King for release.[32] At the conference with the Lords, Selden answered Heath, "Neither is there in the law any such thing, nor ever was there mention of any such thing in the laws of this land, as a petition of right to be used in such cases for the liberty of the person."[33] Yet of all those who were committed for refusing the loan, we know of none, except the five, who asked for the writ of habeas corpus.[34] We know, moreover, that Eliot proceeded by petition to the King for his liberty

[27] L.J. 718.

[28] *State Trials* 3:78. One needs to make no apology for quoting Selden so freely on the interpretation of the common law. He was the great authority for the Commons on that subject, as was Littleton on statute law.

[29] See above the *Statute of Westminster* p. 13.

[30] For the writ in full see *State Trials* 3:11.

[31] "Now, my Lords," said Selden, "if any man be so imprisoned, by any such command or otherwise, in any prison wheresoever through England, and desire, either by himself, or by any other in his behalf, this writ of habeas corpus (for the purpose) in the court of King's Bench, the writ is to be granted him, and ought not to be denied him, no otherwise than any ordinary original writ in the Chancery, or other common process of law, may be denied; which, among other things, the House of Commons hath resolved also upon mature deliberation." L.J. 3:722. For the resolution see Appendix A.

[32] *State Trials* 3:50. [33] L.J. 3:722. [34] *State Trials* 3:2, editor's note.

and the benefit of the law.[35] According to Forster he took this course after having been consulted by those who went the other way.[36]

In this question of the proper procedure for obtaining release from arbitrary imprisonment was contained the whole issue at stake between the Commons and the King, the protest of the people against personal, or council, government. The commission for the loan came from the Council; those who refused to pay were examined by the Council; those committed were committed by order of the Council; it was but in keeping that for release they petition the Council. The protest of the Commons was that the Council was taking upon itself the functions not only of Parliament but of the courts as well.[37] The effect of the writ of habeas corpus was to bring the case into the regular court. It is obvious then why the great common law lawyer should declare against petition and for the writ. It makes clear also the significance of the development of that writ. But until it had a firmer status than in 1628, it could hardly be used as absolute proof against the legality of arbitrary imprisonment.

From this discussion it is possible to see why, to the Commons, the production of Anderson's report had been an occasion for great rejoicing, why the general opinion was that "it made for the liberty of the subject in direct terms."[38] What appealed to them was the obvious intent of the judges that the parties should be brought to trial.[39] Though not in as positive terms as might have been desired, it yet endorsed the judges' action in granting the writ of habeas corpus in all cases.[40] As has been pointed out, this was the only writ by which the subject could bring his case into court when committed by the special command of the King.[41] The judges' resolution was a mile stone in the development of that writ. It definitely established it "as a substantive remedy, which exists as of right for all prisoners."[42] The purpose of the writ was to test the validity of an imprisonment. It made it possible for the lawyers in 1627 to test the validity of arbitrary imprisonment. The comparatively late develop-

[35] Forster, *Life of Eliot* 1:410-414. [36] *Ibid.*, 408.

[37] For this protest see the First Remonstrance and the debates leading up to it. This is the significance of the fourth proposition offered by the Lords as their judgment on the "late habeas corpus" case. "In all cases within the cognizance of the common law, and concerning the liberty of his subjects, his Majesty will proceed according to the common law of the land, and according to the laws established in the kingdom, and in no other manner or use." L.J. 3:769.

[38] B, 36.

[39] Selden was reported as having said at one of the conferences that the assurance of trial meant that the cause must be shown, for there could be no trial otherwise. L.J. 3:762.

"MR. SELDEN: the resolution 34 Eliz. speaks only of those who were committed with a cause, for thei say thei could not be delivered but by triall of law; there must then be a cause expressed, to be subject to the triall" H, 2313:18a. This is the 18th page counting from the back of the book forward. The conference of these two days was recorded in that way.

[40] In the light of the present interpretation it is possible to understand all that that meant to the Commons.

[41] L.J. 3:722 [42] Jenks, 74.

ment of this writ explains to a great extent why the validity of such commitment had not been tested before. The other side of the question is, of course, that only the great abuse of the power would make the need felt. In 1627 these two, remedy and abuse, came together.

Then followed the struggle which resulted in the Petition of Right.

CHAPTER IV

BY BILL

This long explanation of the arguments, pro and con, which were presented at the trial and elaborated in Parliament, has been necessary in order to explain why the Commons were impelled to furnish a solution for the problem of arbitrary imprisonment. The explanation has been fruitless unless it has proved that the impelling force came from the conjunction of abuse and remedy, unless it has proved that the basis in the past for the position taken by the Commons was only of a general nature and in direct opposition to the rapidly developing conception of kingship held by the Stuarts.

The effort of the Commons to settle the question of arbitrary imprisonment resulted in the Petition of Right. It is only one of the four subjects therein contained, but it is the one which throughout was the great stumbling block, the subject of debate and conference. In debate and conference are to be found the explanation for the Petition of Right—the reason for the change from bill to petition, and all that that change implied.

The first step towards the framing of a bill had been the resolutions of the Commons[1] which they passed on April 1, 1628 and immediately sent up to the Lords for their consideration. The second step was the Lords' resolutions which they sent down to the Commons. These came on April 25, after the Lords had had time to weigh the arguments that had been presented before them at the conferences. The Lords had in a sense occupied the position of judges, and their resolutions are in the nature of a decision based on the arguments, rather than an answer to the resolutions of the Commons. Yet they disclaimed that they were a decision in the sense of being final; they would have them considered merely as a starting point for future conference.[2] The resolutions were in five parts. The first declared that Magna Carta and the six statutes were in force; the second that according to statute, custom, and law every freeman had a "fundamental propriety in his goods" and liberty of his person; the third guaranteed to the subject all the liberties, privileges, and rights enjoyed by their ancestors; the fourth promised that all cases falling within the cognizance of the common law, and concerning the liberty of the subjects, should proceed according to that law. These four were general and vague where those of the Commons had been direct and explicit; but the fifth was of quite a different character. It declared in no mistakable terms that the King's prerogative was "intrinsical to his sovereignty

[1] For these resolutions see Appendix A.

[2] Lord Say and Seal, B. 102.

and entrusted him from God," and then, coming to particulars, it declared that when, for reasons of state it was necessary to imprison without showing cause, the King would "within a convenient time . . . express a cause . . . either general or special."[3]

The attitude of the Commons toward the first four of the Lords' resolutions was that they were meaningless, that to pass them was to accomplish nothing. Sir Edward Coke held them up to ridicule, phrase by phrase. "Our resolutions," he summed up, "are plain and open and clear, what theirs are we are to dispute."[4] "Our own are all cleere points of law," said Selden, "the answeare is not what is law, but what they would have to be law."[5] Yet to keep a good feeling with the Lords some were willing to accept them; there was no harm in reaffirming Magna Carta. But on the fifth the opposition was positive; to accept that was to decline their own propositions. "Reason of State," said Coke, "lames Magna Carta."[6]

They all realized, however, that criticism would get them nowhere. Few were ready with a plan of action. Sir Edward Coke, in his blunt way, was opposed to all compromise. If the Lords would not yield to them, then let them go directly to the King.[7] But the spirit of the House was conciliatory. It was Wentworth who presented the plan that was to be followed. He proposed that, ignoring the fifth proposition entirely, but using the others as much as possible, they go by bill, explaining *lex terrae* and attaching a penalty for the violation of the law. Two days had been taken up with this debate, Friday and Saturday. On Monday, April 28, before the debate could be resumed the Commons were called up to the Lords' House to hear a message from the King. The substance of the message was that every day the need for supply increased, that debate on the liberty of the subject was the cause of delay; therefore, in order to put a stop to the delay the King would declare his intention. It was equivalent to the first four propositions of the Lords, that he would confirm Magna Carta and the six statutes, maintain the subjects in their just liberties, and govern according to the laws. For this he asked them to rely upon his promise.[8] After their return to their own House, Secretary Coke enlarged upon the King's message. He argued that they would get as much by the promise as by law for "whatsoever law we shall make it must come to his Majesty's allowance." He pointed out the advantage of the promise over a law. "His promise is bound with his own heart,"[9]

[3] L.J. 3:769.

[4] M, 126 *verso*. "Ours are playne and do conclude something, these do not." B, 109 *verso*.

[5] B, 110.

[6] B, 109 *verso*. Who shall judge of "convenient time" questioned Selden. "At this little gap every man's liberties in time may go out." M, 128 *verso*.

[7] B, 110. [8] O.P.H. 8:77-78. [9] *Ibid.*, 81.

but against a law the King could use his dispensing and pardoning power,[10] "all law with the wrath of a King is nothing."[11]

From both the Lords and the King had come offers to compromise; nor were there lacking those in the House who would urge the same thing. Rudyard would have had them take stock of what they had already won. The King's counsel, the judges, the Lords, and the King had all declared that the laws were in force; they were assured, then, of the reënacting of Magna Carta. He doubted not but by free conference with the Lords they would gain liberty of persons and goods; he hoped that they might have a law against forced loans and privy seals; but it was more important that they keep Parliament than that they should gain all they desired in this Session.[12] But in spite of the King's message or the appeals of Secretary Coke and Rudyard, the Commons went on with their bill. After some debate it was resolved that a select committee be appointed "to draw a bill, wherein shall be contained the substance of Magna Charta and those other statutes that concerne the liberty of the subject in his person and estate, together with the resolutions of this house concerning those things."[13] Seemingly neither the efforts of the Lords nor of the King had been able to weaken the determination of at least a majority of the Commons. On the afternoon of the 28, the committee met and framed a bill[14] which was presented by Sir Edward Coke the next morning. The bill was framed to cover imprisonment, taxation, and billeting. For a preamble it recited the statutes which the Commons considered had been violated. Those against imprisonment are the same as had been presented by Littleton with the addition of 25 E. 1, c. 2, that all judgments contrary to Magna Carta are null and void.[15] The resolutions were to follow the statutes, but only the first and third are given in the bill.[16] At the end of the bill was to be placed the penalty for its violation; this, however, as Coke explained, was not yet resolved upon.[17]

In transforming their resolutions into a bill many practical considerations arose which had not before been considered. The resolutions had stated principles, things that "ought to be." The bill, as proposed by Wentworth, was to be one by which these principles could be enforced. It was here that the split arose among those in the House who a month before had been united in support of the resolutions. On one side were the opportunists led by Wentworth who would abandon whatever could not be enforced; on the other side were the reformers led by Sir Edward Coke who would hold to their resolutions regardless of any immediate, practical end. These terms, *opportunist* and *reformer*, were never used at

[10] G, 2:136. [11] B, 114 *verso*.
[12] O.P.H., 8:81-84; G, 2:137-139. [13] H, 2313:128. [14] M, 135.
[15] H, 2313:130; B, 117; G, 2:150; M, 136 *verso*.
[16] For the bill, as found in M, 137, see Appendix B. [17] G, 2:150.

the time to designate the followers of Wentworth and Coke, but they so aptly characterize the two groups that it has been found convenient to refer to them in this way. The Five Knights' Case was an effort to test the writ of habeas corpus, an effort to make it more definite, even to increase its effectiveness, by judicial decision. To many the struggle that had been carried on in Parliament up to this time had only this end in view. To these a habeas corpus law was the natural outcome of the struggle. They argued that if those who were committed at Whitehall could be quickly and surely released at Westminster the commitments would inevitably cease. But there were some who were more farsighted. Their position it is that is made clear in this three days' debate. Their reasons for holding fast to the first resolution which had become the great stumbling block are no longer left in doubt. Rich started the ball rolling by raising the question whether the cause should be shown at the time of commitment, or not until the return of the habeas corpus.[18] The debate that followed shows that the members were not even agreed as to the end for which they were fighting. Fleetwood was as positive that the end of their law was to deliver out of prison[19] as were Shervile[20] and Stroude[21] that it was to prevent imprisonment.

Behind this was more than just a misunderstanding; it was a difference of opinion as to the way to overcome the abuses. If a good habeas corpus law would prevent arbitrary imprisonment, why miss the chance of gaining that by fighting for a principle which was so bitterly opposed by the King and Lords? Why contend, in other words, for their first resolution if all they needed were the second and third? The debate clearly proved that the subject would gain no practical advantage from having the cause shown to the jailor at the time of commitment. Coryton had, indeed, claimed that it would give time for the prisoner's counsel to prepare his argument and so have it ready upon a habeas corpus;[22] but Noy answered that the jailor was not bound to communicate the cause.[23] Rolle thought that he would gain his release sooner. If committed at the beginning of the long vacation he would have a long wait for his habeas corpus, but if the cause was expressed upon the commitment and it was not just he could bring action against the jailor for false imprisonment. Then, warming up to his subject, he showed that this was "a better remedy than a habeas corpus for it gives costs and damages, so granting this we undoe all the rest."[24] Hobby answered that this would not help him to his liberty an hour sooner for he could have his habeas corpus out of Chancery during vacation time.[25] And Whistler pointed out that the jailor is only responsible as to whether he who commits has power to do so, and it must

[18] G, 2:154. [19] G, 2:156. [20] 140 M, *verso*.
[21] H, 5324:8. [22] G, 2:155. [23] M, 139 *verso*.
[24] H, 2313:131. See also M, 137 *verso*; N, 110; G, 2:157. [25] H, 2313:131; G, 2:158.

be conceded that the Council have the power.[26] After this discussion Pym's question seems perfectly justifiable: "If the Gaylor can neyther say or knowe any thinge, why should wee streive for that that is unnecessary?"[27]

But though showing cause at the time of commitment would not release the party it might still have a practical advantage. Grimston,[28] Eliot,[29] and Coke[30] spoke not only of their own actual experience but of that of many others when they showed that after their commitment their rooms were searched and out of evidence then found, a cause was trumped up. Digges answered that the search could have been made as well before as after their commitment.[31] Eliot spoke also of secondary causes being given. For example, the men who were imprisoned in the Fleet for denying the loans, after being called before the Council Board were sent back to prison and it was "cast out it is for contempts and ill carriage."[32] To this Wentworth answered that if they made such a law it would be evaded by giving false causes.[33]

The most serious objection, the one that clearly divided the opportunists from the reformers, lay in the fact that there was no way of enforcing the first resolution. "There wants a penalty," said Seymour.[34] "This bill without penalty will be to take a shadow and leave the substance."[35] The offenders were the privy counsellors. Any penalty the Commons could attach the King could pardon. Why run the risk of breaking Parliament in order to pass an act that could not be enforced?[36] This was why the opportunists proposed alternative measures that would catch the men lower down. Seymour's proposal was against the deputy lieutenants and justices of the peace who for fear of losing their places carried out the commands of the Council.[37] But the most popular plan was to depend upon a habeas corpus law and hold the judges responsible. This was advocated by Noy,[38] Pym,[39] and Wentworth.[40]

[26] G, 2: 164. [27] B, 118. [28] *Ibid.*; G, 2:157. [29] M, 137 *verso*.

[30] M, 138. [31] N, 112; G, 2:160; H, 2313:132. [32] G, 2:159. [33] G, 180.

[34] M, 141. [35] H, 5324:8. [36] Noy. M, 139 *verso*-140. [37] H, 5324:8; M, 141.

[38] Noy brought it up first, having proposed it on the 26 (M, 128 *verso*-129), and repeated his proposal again on the 30 (M, 139 *verso*). Gardiner magnifies Wentworth's part too much (6:266), apparently making him alone responsible for the modified bill as he formulated it on May 1.

[39] B, 118; G, 2:155. [40] G, 2:179; M, 141 *verso*-142; N, 121-122.

Gardiner discusses at some length the plan of Wentworth for a habeas corpus act. His interpretation of the plan is that the act would leave to the judges "the ultimate decision of the legality of the committal" (6:267). The debate in the House does not bear out this conclusion. It was not the intention of the framers of this plan to leave the decision to the judges, but to determine the question of legality by the act itself. The weakness of their position lay in the fact that their proposed act did not determine it. This was clearly pointed out by Mason in a long speech in which he showed the results which would accrue from a habeas corpus law based on the second and third resolutions. Without the first the third admitted the right to commit without cause. The second obliged the court to release such a party, but there was nothing to prevent his being arrested again on the same kind of warrant (O.P.H. 8:89-94). The failure of this proposal for a habeas corpus law to gain support in the House was due to this very fact that it did not determine the real point at issue. Because he missed this point Gardiner failed to understand the real cause for the split between the two parties in the lower House.

Not that the opportunists denied the principle in the first resolution. "Noe King, no counsell, no judge, by Gods law or mans can lay imprisonment . . . at his pleasure," said Pym. The motive of the punishment must be "in the party himself."[41] Noy was as positive that according to the law "the cause ought to be expressed."[42] Wentworth agreed "the resolutions are according to lawe."[43] Banks, who was as great an opportunist as any was even more explicit. "The cause ought to be expressed uppon the commitment as well as uppon the returne . . . This question is the hinges of this busines and will turne the whole. I would have it declared that to commit anie without expressinge the cause is against the lawe."[44] Noy, too, would declare but not enact it.[45]

Nothing shows more clearly the motives which prompted the reformers than their answers to the opportunists. Shervile gave two reasons when, on May 1, he answered the objections. "Some object what good shall wee gett if it bee enacted onely, onely that the lawe is thus," that is knowing that it will not be kept. "I answer it is comfort to mee in my imprisonment that it is against the lawe." When these men went to prison it was not the physical discomfort or the loss of freedom that they minded most, but the reproach and disgrace. Shervile spoke of it as "a miserable calamity and prejudice, a civil death, brings terrors, affrightness, forsakings of friends."[46] "A man suffers in his reputation," said Eliot.[47] And Sir Edward voiced the same thought when he said, "this commitment is fearfull, all mens mouths are open against the partie."[48] They surely needed the comfort of knowing that in submitting to such ignominy they were upholding the law. But this was a small and selfish reason as compared with their other. Shervile showed that, since the question had been raised, to abandon it was in reality to declare against it. "It will be urged against us, if any be so committed, that indeed it was agitated in the house, but that it stuck with the Lords and wee could not gett it passe. . . . [We] may say wee hope no man shall more be so committed but can give no assurance of it and that ourselves shall have waved our common right, and not have maintained what wee have declared to be law."[49] Mason was even more explicit. "Altho' the King or Council, as it hath been objected, by might may commit us without cause, notwithstanding any laws we can make; yet I am sure, without such an Act of Parliament, such commitment can have no legal colour; and I would be loth we should make a law to endanger ourselves."[50] By "such an Act" he refers to the habeas corpus act based on their second and third resolutions. Such an act, he maintained, by implying that the cause need not be shown until the return of the writ of habeas corpus, would be "a general or per-

[41] G. 2:155. [42] M, 139 *verso*. [43] M, 141 *verso*. [44] M, 137 *verso*.
[45] M, 139 *verso*. [46] M, 140 *verso* and H, 5324:6 combined. [47] H, 2313:132.
[48] M, 138. [49] H, 5324:7. [50] O.P.H. 8:94.

petual dispensation" of Magna Carta.[51] They must stick to their first resolution or abandon all.

The opportunists were going around in a circle. Let it "be enacted," said Wentworth, that we shall be bailed "if habeas corpus be brought and no sufficient cause."[52] But who was to define "no sufficient cause"? Either it must be done by law or left to the judges. The judges had been given the opportunity to decide in the "late habeas corpus case"; but, as Sir Edward Coke pointed out, they "have not disclaimed it, that they could not be bailed who were so committed, only explained themselves that they gave no such judgment."[53] But Sir Edward was told that they would not dare to do that after Magna Carta and the explanatory statutes had been confirmed. This was touching a weak spot, for all along it had been asserted that the resolutions contained nothing new. This was the basis on which Wilde, Digges, Hakewill, Banks, and Wentworth argued that it was not necessary to insert their resolutions in the bill at all, that the reënacting of the old laws was all that was necessary. Pushed into a corner Coke and Eliot admitted that the recital of the old law was not sufficient. "I conceive nothing is new," said Eliot, "all that wee seeke is but the explanation of the lawe, but the old put in fuller sense."[54] Sir Edward admitted even more. Speaking of their first resolution he said, "the Acts of Parliament include theis questions in substance but it is only implied."[55] They must have an explanation of it enacted in the body of the bill "else Mr. Attorney will come with a relief and wipe all out with a distinction."[56] Until there was a law stating in no equivocal terms that commitment by the King without cause shown was against the law, until there was such a law how could they be at all sure that the judges would bail? The reformers rightly maintained that it was they that held to the substance and the others to the shadow.

In this three days' debate the position of the reformers is clearly defined. The cause of the break between Wentworth and Sir Edward is made evident. Wentworth had stood for a law by which the offenders could be punished. Though on the surface this seemed the practical thing, it was proved to be quite the reverse, for no law they could make would touch the real offenders. The really practical thing was a declaratory law. This in its nature was like a judicial decision; not a law to be put into operation against individuals, but a law which the judges must recognize in making decisions.[57] In this kind of a law the explicit explanation was

[51] *Ibid.*, 90. [52] N, 121-122. [53] H, 2313:133. [54] M, 139. [55] M, 138. [56] G, 2:163.

[57] Gardiner missed entirely the point of difference between Wentworth and Coke. To him one was the moderate man the other the extreme (6:268-271). From this it followed that he looked upon the change of policy in the same light. "The Commons, if they were to carry their point at all, must set their teeth hard and declare war to the end against their sovereign" (*Ibid.*). "After Wentworth's failure it was not likely that the House would again ask for anything short of the extreme measure of its claims" (*Ibid.*, 272). With this idea firmly fixed in his mind, it would be hopeless to expect Gardiner to have any realization of the real nature of the Petition of Right.

the important thing. That explanation was contained in their first resolution, and to that resolution the reformers were determined to hold fast. This marks the first step in the change from the bill of April 29, to the Petition of Right. The change was due entirely to debate within the House. The next change was to come from pressure brought to bear by the King.

On the next few days, messages from the King followed each other in quick succession. The effect was to convince the Commons, more than ever, that an explanation was essential. So essential did they consider it that they willingly abandoned going by bill from which all explanation would have been excluded, and went by a more uncertain way. The King interrupted the debate on May 1 by a message demanding to know whether they would abide by his promise or not.[58] When Rich asked if this meant they should not proceed by bill,[59] Secretary Coke answered, if it be by a bill that contains noe enlargement of our ancient right . . . it will pass."[60] The next day there was another message from the King renewing his promise but asserting that he would not have the laws enlarged "by newe explanacions, interpretacions, exposicions, or addicions in any sorte, which hee telleth us hee will not give way unto or endure."[61] In answer to this message the Commons sent a conciliatory remonstrance to the King, the thought and wording of which came from Wentworth.[62] This proves that by this time even the opportunists were convinced of the necessity of explanation. They maintained in the remonstrance that they had not "the least thought of straining or enlarging the former laws;" that they only wished to make necessary explanation and provision for execution.[63] The King's answer came back the same day, that any explanation would "hazard an Incroachment."[64]

These messages of the King positively prohibited any bill which should be more than a bare confirmation. This was the reason that the bill was abandoned. Of what use was a bare confirmation? Sir Roger North put the situation in a very vivid way. "They will aske us when wee come home," he said, "what reliefe wee have brought them, wee tell them wee have confirmed the old statutes, they aske us when they were repealed."[65] The only question in regard to the laws was the question of their interpretation; *lex terrae* must be explained.[66] The remonstrance proves that even the opportunists were convinced of that. But to clear up any misgivings that might remain the lawyers were called upon to explain whether any

[58] O.P.H. 8:94-95. [59] H, 5324:11. [60] *Ibid.* [61] B, 120. See also O.P.H. 8:98-99.

[62] He "delivered it up to the Chair having penned it and enlarged it as he sat." B, 127 *verso.*

[63] O.P.H. 8:102. [64] *Ibid.* [65] B, 140 *verso.*

[66] North. "A confirmation of Magna Carta and the six other statutes will not give our country satisfaction, for the riddle of *lex terre* is not yet unfolded." N, 142.

In summing up the arguments at the conference before the Lords, Heath had said: "How this *ex terrae* is to be expounded, is the main apple of contention." L.J. 3:763.

possible good could come from a bare confirmation.[67] The lawyer who answered was Littleton, the recognized authority on statute law. He declared that not only would they gain nothing but they would lose much. To agree to a general confirmation was, in the eyes of the public, tacitly to recede from their resolutions.[68] More than that he declared that "a gentleman in the country that knowes not our Resolutions will never be able to extract out of these lawes those points wee have here resolved."[69] Under no circumstances would he accept a bare confirmation.[70] This was the general feeling. Rather than give up the explanation the Commons abandoned going by bill, and sought for some other means of getting their explanation on record. This they found in a petition of right.

[67] N, 141; G, 3:60; H, 5324:23; B, 140.

[68] "It will weaken the oppinion of us abroade. Will not the world thinke wee tacitly desert our former grounds?" B, 140.

[69] N, 141-142. [70] For this speech see also G, 3:60-61; H, 5324:23; M, 150 *verso*.

CHAPTER V

BY PETITION

When, on May 6, the Commons had found themselves forced to relinquish their bill for a declaratory law, the idea of abiding by the King's promise began to receive more favor. The objections to the King's offer, as contained in his message, had been two; as worded it was too general and vague to be any help against the specific grievances of the time, and secondly in the form of a message to the Commons there was nothing to insure its permanency. Gradually the feeling spread that if these defects could be overcome they would be willing to abide by the King's word. It was at this point that it was proposed that they proceed by a petition of right.

In order to understand just what this proposal meant it is necessary to keep clearly in mind the differentiation in petitions which had taken place as Parliament developed as a legislative body. One differentiation was due to the change from petition to bill. Certain general, important petitions, which the King had assented to, were afterwards drawn up in the form of statutes. To obviate the danger of changes in the wording, Parliament began introducing these in their final form, that is as bills instead of petitions. This made the difference between public and private bills. For though the lesser demands still kept the old form of petition they adopted the new procedure of three readings in each House and the King's assent in stereotyped form at the end of the Session. But this new procedure was given only to a certain kind of lesser demand, that is to those petitions which asked for legislative remedy—petitions of grace. Petitions of right, those asking for judicial remedy, were sent directly to the courts having jurisdiction. Such petitions of right, coming from individuals, were very common; but a petition for judicial remedy coming from both Houses of Parliament was very unusual. Only from what the Commons themselves said do we know what they meant by having Parliament proceed by a petition of right. According to their statements, for the Houses of Parliament to present a petition of right to the King was for them to act in their judicial capacity as the High Court of Parliament, was for them in that capacity to declare what the law was. The King's assent would have the same effect as his assent to a private petition of right; it would assure its enforcement in the courts. It would confirm the declaration of the Houses; it would make it an interpretation of the law on which the judges must act. A petition of right was the only remedy when there was a conflict between the subject's right and the King's prerogative. This is the essence of the private petition which still begins a civil

suit by the subject against the King. The character of the public petition was essentially the same.

In considering the Petition of Right, there are two lines of thought which must be followed. They are, indeed, the two objections which had been made to the King's promise as contained in his message; they were also the questions which were asked before the Commons would consent to proceed in this unusual way. The first question was whether the petition could contain the explanation as found in their resolutions of April 1.[1] The second was whether the petition and answer would be binding on the judges. In the discussion which follows these two questions must be kept clearly in mind, and distinct from each other. The first has to do with the content of the Petition; the second with the procedure, for it was the procedure which would determine whether in the end they had an act or only a petition and answer. The first work devolving upon the leaders, who advocated the change from bill to petition, was to convince the members of the efficacy of the new plan. The discussions which took place in the House before the Petition was framed, and again after it was accepted by the Lords and the time for the formal procedure had come, make it very clear what the leaders hoped to accomplish by their Petition.

In the form of its content the Petition was to be a compromise between the declaratory bill and the King's message, more conciliatory on the one hand, more definite on the other. Even when they still expected to go by bill, the Commons showed a willingness to put the bill in the form of a promise. Many of the Commons had been impressed by the difference between the wording of the Lords' resolutions and their own. Instead of their "Resolved . . . that the free man ought to be," the Lords' resolutions read "That his Majesty would be pleased graciously to declare." So when the bill was presented in the words of their resolutions there was a protest. "I like not," said Digges, "to put it in a Law that the King ought not: never act spoke in such language."[2] Shervile answered Digges that it was the language of Magna Carta: "Wee make lawe accordinge to the language of the lawe."[3] When the Lords' resolutions came down, Sir Edward Coke had objected to the form because it implied an act of grace "whereas it is of right,"[4] but by May 2, he was willing to make some concession. He was willing then that the bill should be worded as coming from the King; "We will and grant for us and our successors by consent, etc."[5] And when Sir Edward gave up on any point the matter was settled.

It was during the debate over their remonstrance presented by the Commons to the King on May 5, that the idea definitely took shape that there was too much dealing in generalities, that they needed to be

[1] For the resolutions see Appendix A. [2] G, 2:175. [3] M, 140 *verso*. [4] H, 2313:121. [5] G, 3:19

more explicit. On May 1, Sir Edward Coke had pleaded with the Commons to "deale clearely" with the King.[6] After the King's message on the following day this need was felt to be even more imperative. This time the plea came from the King's supporters. They insisted that a general answer would give no satisfaction to the King, that the form of their bill would best show their answer.[7] All seemed willing to be more definite. Though the Commons insisted on sending the remonstrance they were willing to declare in it whether their resolutions were to be included or not. Men as far apart as Littleton[8] and Secretary Coke[9] were here in agreement. But Sir Edward pointed out that it was against parliamentary procedure to tell the King what they were going to do in the future, that they could only promise not to encroach upon the prerogative.[10] That to Secretary Coke was to "answer nothing but riddles."[11] The idea had taken root that only by being explicit would they be able to come to any understanding with the King.

The natural corollary to this demand was that the King be more explicit with them. He said he was willing to rule according to the law. Would he say wherein the law had been violated? This was but another way to gain their demand for an explanation of the law. The reason that an explanation was necessary was because the law had been violated;[12] then in the admission in particulars lay the explanation. "I would be glad to hear the King say," said Rich, "hee may not by lawe billet soldiers, or lay loanes."[13] Pym spoke to the same effect: "Wee complaine of our unjust imprisonments uppon loanes, I heare not one say wee shall have noe more, or that matter of state shall bee noe more pretended when there is none; for billeting of soldiers, is it said that it is against the lawe?"[14] He thought that the lords who put the soldiers upon them really believed that they were within the law. Grimston reminded them that they had had even a better example than that of the misinterpretation of the law. He called to their minds Secretary Coke's assertion on May 1, that he would continue to commit without showing cause to judge or jailor because "others in the same place have committed freely without complaint of the subject."[15] This was plain speaking which Sir Edward had endorsed by saying, "Now is the ax laid to the root of the tree."[16] Pym and Rich had declared that with this kind of explanation they would be willing to

[6] M, 144 *verso*.

[7] May. M, 146 *verso*; B, 132; H, 5324:17; G, 3:33; N, 133. Secretary Coke. M, 147; B,132 *verso*; G, 3:34-35.

[8] M, 147 *verso*. [9] M, 147 *verso*; B, 134; He seconded Littleton's motion. [10] *Ibid.*; N, 135.

[11] M, 147 *verso*. [12] Wentworth: "A public violation requires a public satisfaction." B, 126 *verso*.

[13] M, 151. [14] M, 151 *verso*.

[15] G, 2:183. For Grimston's speech see M, 152; G, 3:68; B, 142. He concluded by saying if Coke did as he said "I look ere longe to bee in the Fleete agayne." B, 142.

[16] M, 142 *verso*.

rely upon the King's word. Secretary Coke was quick to take advantage of the opening for compromise. He was confident that if they petitioned the King he would declare that imprisonment for loans was unlawful.[17] Sir Edward Coke immediately proposed that they proceed by a petition of right.

As far as its content was concerned the Petition of Right would differ from the declaratory law they had desired only in the substitution of particular grievances for the general statements contained in their resolutions. The Petition of Right was no more judicial in its nature than the declaratory law. They had a common beginning. In his introduction to the *Records of Parliament Holden at Westminster 1305*,[18] Maitland makes the statement that at that time there was no hard line drawn "between the true petition of right which shall be answered by a *Fiat justitia* and all other petitions."[19] According to Professor McIlwain the idea of "making law" as we understand it was entirely foreign to 17th century thought.[20] "In mediaeval England," he states again, "legislation in its proper sense was all but unknown." He quotes Mr. Jenks[21] for the expressions that they are "not enactments, but records," that they are "the law of a court."[22] Professor McIlwain maintains that in 1628 this idea remained; that Parliament still seemed primarily a "law-declaring machine;" that its function was still in large part "merely the enforcing and applying" of the fundamental law.[23] The Commons had already decided, when they still expected to go by bill, that they desired not a law with a penalty but a declaratory law. On the side of content that was a much greater change than the one now proposed. But the question whether the Petition could contain their explanation still remained. It had really split itself into two. First, whether in this form the King would allow the explanation; and secondly, whether particulars could contain the substance of their resolutions of April 1.

The first question was raised by Eliot. To go about explanations, he said, "is to laboure in vayne for wee are forbidden."[24] But the rest seemed confident that the King would do what Secretary Coke had promised, that he would declare particular grievances illegal. It was, indeed, their only hope. "His Majesty," explained Rich, "said hee would have noe paraphrase or addicion, but in this way we may prefer it."[25] This answered the first question, and it showed also, what can not be emphasized too much, that petition was the only way left by which the Commons could place their explanation on record. That it was not the best way, even on the side of content, is to be seen from the discussion of the second point.

[17] M, 152; B, 142-*verso*; G, 3:70.
[18] Rolls Series.
[19] p. 68.
[20] *The High Court of Parliament* (1910), p. 46.
[21] *Law and Politics in the Middle Ages.*
[22] *The High Court of Parliament*, 42, 43.
[23] *Ibid.*, 110.
[24] B, 142 *verso*.
[25] M, 153.

"Let the substance of our resolutions bee putt into the peticion and I doubt not of a fayre answere," said Littleton.[26] But could the substance of their resolutions be put into the Petition? Was it possible for the narratives of particular grievances, with the prayer for remedy, to cover the sweeping statements contained in their resolutions? Later on the judges were to maintain that they did not. At this time the lawyers must have known what the interpretation would be. To go by particulars was to weaken their position. It was a compromise for it left loopholes through which other, perhaps even more obnoxious, grievances might creep in.[27]

The second objection made by the Commons to the King's promise had been that they could not depend on it. The Commons found more than one polite way of saying this. "Were the King immortal," said Noy, "I should be content with his Majesties word, but who knowes the disposition of the next succeeding King, lett us therefore pass a law for posterity."[28] Banks,[29] Wilde,[30] Phelips,[31] and Wentworth[32] all talked glibly about posterity. Scudamore answered them that if it was only for posterity they could not justify their act, if the need arose "let posterity make a law for it."[33] Some were for bill instead of the promise because the people would give more readily; promises would not satisfy them.[34] This was only transferring their own doubts to their constituents. Coryton, alone, was willing to say what the others thought, that the King's promise could not be relied upon. He said it not once but three times, and his proof was that though the King had answered their petition against billeting, the abuse continued.[35]

To go by bill was the regular parliamentary way. This was pointed out by more than one.[36] Sir Edward Coke said the final word on this point in the often quoted words: "For the King's honour, he cannot speak but by record."[37] That was on the second of May; on the sixth when the tide was turning in favor of going by promise he said the same thing but even more pointedly—"the King must speak by record."[38] In the same speech he proposed the middle course which was to be adopted. "Let us go in a parliamentary way: for anie not to relie on the King it is not fitt. Trust

[26] B, 143.

[27] "The way of petition is new," said Coryton, "and I know not how we may name all particulars, which if we omit, the country is where it was." B, 144.

This is not at all Gardiner's view of the change. He writes: "Everything to which he [the King] had objected in the Bill re-appeared in the petition in a harder and more obnoxious form. . . . His acceptance of the Bill would have been a friendly agreement to order his relations with the nation on new terms. His acceptance of the petition would be a humble acknowledgment of error" (6:275). But it was easier to acknowledge error in the past, than to bind himself by "new terms" for the future.

[28] M, 139 *verso*. [29] M, 137 *verso*; N, 110. [30] G, 3:10; B, 125 *verso*.

[31] B, 119 *verso*. [32] N, 126; M, 144 *verso*; G, 3:16. [33] H, 5324:7.

[34] Rich. B, 117 *verso*; M, 137. Seymour. M, 144 *verso*; G, 3:17; B, 126 *verso*.

[35] April 29: B, 117 *verso*; G, 2:154-155. May 2: M, 144 *verso*; G, 3:18. May 6: B, 140; M, 150 *verso*.

[36] Banks, N, 110. Hoskins, M, 144 *verso*; G, 3:17. [37] M, 145. [38] M, 152.

in him is all the confidence wee have under God; he is Gods lieutenant, trust him wee must. Was it ever knowne that generall words were a sufficient sattisfaction to particular grievances, was ever a verball declaracion of the King *verbum Regnium?* When grievances bee, the Parliament is to redress grievances and mischiefes that happen; imprisonments are our grievances, billetinge of soldiers, unnecessarie loanes etc. Did ever Parliament rely on messages; they ever putt upp petitions of there grievances and the King ever answered them. The Kings answer is verie gracious, but what is the lawe of the Relme; that is the question. I putt noe diffidence in his Majestie; the King must speake by record, and in particulars not in generall. Lett us have a conference with the lords and joyne in a petition of right to the King for our particular grievances. . . . Messages alone never came into a Parliament. Lett us putt upp our petition, not that I distrust the Kinge, but because wee cannot take his trust but in a parliamentary way." This middle course Coke proposed was to take the place of relying on the King's message, which he maintained was contrary to parliamentary procedure.[39]

But that it was parliamentary did not necessarily imply that it was legislative procedure, even though the Lords joined with them. The object in having the Lords join with them was that thereby the petition might become a record. "The petitions which move from this House alone," said Wentworth, "are not put upon record, but the Lords joyning with us then they are."[40] That their petition should become a permanent record was the thing, perhaps, of greatest importance to the Commons. Hakewill had objected to the change to petition because, though they had had many petitions and answers of late, yet "if we look after them they are not to be found."[41] "It will be a record," said Sherland, "when it hath the Kings answer and entered on the Roll in the Lords House."[42] It will be a record, explained Phelips, "of the King, the Lords, and us. This is no skrowle to bee lost at Whitehall or elsewhere, but a record fitt for the Tower."[43] It would be a record of what the law was.[44] This meant that in its capacity as the highest court of the land Parliament would make a judgment. "The lords have judges with them and wee that have been in the same school agree with them what the law is."[45] This statement from Sir Edward Coke shows how clearly he conceived that Parliament would be acting in its judicial capacity. "We declare the lawes," said Eliot, "which when his Majesty shall answeare, it will give sense[46] to them."[47] "If the King subscribe his hand," was Pine's explanation, "he subscribeth that all therein is our right."[48]

[39] M, 152. "We found this way as a middle course that is free from all the King's messages." M, 201 *verso.* [40] H, 5324:28. [41] M, 153. [42] G, 4:113. [43] B, 195.
[44] Pine. M, 201 *verso.* [45] M, 202. [46] *Life* instead of *sense* in M (200 *verso*).
[47] B, 194 *verso.* [48] G, 4:113.

It is very evident that Coke had proposed a much stronger way than relying on the King's message. He had proposed the parliamentary way for redress of grievances. But the Commons were not willing to accept this proposal unless it was to have the force of a law. "If petition amount to a law I like it," said Coryton, "if not I am against itt, for we shall act nothinge."[49] Others, though they consented to go first by petition, expressed their unwillingness to commit themselves as definitely giving up procedure by bill as their final action.[50] The question was left in the air until the time came that it was necessary to take formal action. That was after the Lords had agreed to accept the content of the Petition, and it was necessary to decide definitely whether they should follow the procedure of a bill or petition. Then on May 27, Coke,[51] Littleton, Phelips, Alford,[52] Sherland,[53] all maintained that they could not in honor change back again to a bill. "If we go not by petition," said Littleton, "we forsake our promise to the King, endanger the work, and quite depart from the Lords."[54] "I appeale to any mans harte," was Phelips way of putting it, "whether ever it were intended otherwise then as a petition."[55] To this Coryton answered: "The first intent of this House was by way of penalty and by a new lawe; we fell upon a petition, but we all proposed to make it the strongest we canne. It is true the King will not have a new lawe, but in this [we] goe not beyond the lawe, nor have wee enlarged our liberties, and this is confirmed by the wisdome of the whole Kingdome represented by the lords house and ours."[56] Coryton would have opened up the whole question anew.

This debate of the 27 makes clear what was not clear from any evidence that we had for the 6, that those who advocated the petition then knew that it would not be equivalent to a law. "We went to this as a middle way," said both Alford[57] and Coke.[58] Pine was even more positive: "At the first the question was made whether the way of petition was a binding law or no; and it was then declared that it was not, and then also we agreed to trust the Kings word."[59] It was Pelham, however, who gave the real reason for desiring to hold the members in line for the petition. "The King declared," he reminded the House, "that if wee went by Act of Parliament, he would not assent."[60] After their long struggle with

[49] B, 144.

[50] Wentworth, G, 3:74; Digges, H, 5324:28. Eliot, *Ibid.*, 27. When it was moved to put it to the question whether to go by petition, Eliot wished to amend the motion. "Not to put the question of petition of right singly to the question, but so to be drawn as that it, and the King's answer, be putt upon record, entered into the motion of both houses, and after to be putt into a bill."

[51] "To add a new addition and join to a law again, we shall not do like ourselves." M, 201 *verso.*

[52] "The lords may take it ill, and somebody else too." G, 4:111.

[53] "We all promised we would trust the Kings word, so that it were *Verbum Regum* to a petition of right." M, 201.

[54] B, 194 *verso.* [55] *Ibid.* [56] M, 201. [57] M, 200 *verso.*

[58] *Ibid.*, 201 *verso.* [59] M, 201 *verso.* [60] G, 4:113.

the Lords, the leaders had no intention of courting failure by allowing the King such a loophole.

With all hope gone of changing the Petition back to a bill, the doubtful members raised the question that was the real test—would it bind the judges?[61] Pelham[62] and Pine[63] declared that though they could not take notice of the Petition, yet they would be bound to take notice of the laws of which it was an explanation. Sherland went further, claiming that as a record the judges were "bound to take notice of it."[64] And Sir Edward Coke quoted precedents to prove that "whatsoever the lords house and this house have at any time agreed upon no judge ever went against it; and when the judges in former times doubted of the law they went to the Parliament, and there resolutions were given to which they were bound."[65] Evidently these assertions satisfied at least a majority of the members, for it was ordered "that this Petition of Right as a Petition of Right be sent up to the Lords."[66]

Both in content and procedure the Commons had determined to go by petition. Yet in order to satisfy certain members some legislative procedure was mixed in. It is due to this mixed procedure, no doubt, that we have such contradictory statements as to whether or not the Petition became a law. Only by following its course step by step as it went through the Houses, was answered by the King, was enrolled, and finally as it was interpreted by the judges, is it possible to find out what the Petition and Answer are.

[61] Ball: "If it be as a petition, I would know if the judges can take notice of it." M, 201.

[62] G, 4:113. [63] M, 201 *verso*. [64] G, 4:113.

[65] M, 201. It seems probable that it was to this statement by Coke that the King made reference in his speech to both Houses at the close of the Session. "I command you all that are here to take notice of what I have spoken at this time, to be the true intent and meaning of what I granted you in your Petition; but especially you, my Lords the Judges, for to you only, under me, belongs the interpretation of the laws; for none of the Houses of Parliament, either joint or separate (what new doctrine soever may be raised), have any power either to make, or declare a law without my consent." O.P.H. 8:242.

[66] G, 4:115.

CHAPTER VI

FORMAL ACTION ON THE PETITION OF RIGHT

In spite of a considerable opposition, the Commons had resolved to go, not by bill, but by petition. They carried out this resolution, but in doing so they yielded to the opposition wherever possible. In considering the procedure, therefore, one must decide at each step not only whether it was legislative (the procedure for a bill), or judicial (the procedure for a petition of right); but also whether it was a step which definitely committed the Commons to the one or to the other. The question is further complicated by the fact that this was a very unusual kind of petition. Most of the petitions at this time came from the lower House only;[1] or, if from both, the request was for something of a temporary nature as, for example, a fast day. At every step, therefore, the proper mode of proceeding was open to question. For this reason it is impossible at times to say any more than that that particular step did not commit the Commons definitely to procedure by bill. But though on one hand the novelty of the Petition complicates the problem, on the other hand it helps the student to solve it. Because of the novelty, each step was thoroughly discussed by the Commons before any action was taken. For this reason we are never in doubt as to their intention or as to the exact significance they attached to their action. Another complication arises from there being two kinds of bills, public and private. One would naturally suppose from its content, that if enacted the Petition became a public not a private act. Yet it will be seen that wherever the procedure was legislative it was the procedure for a private and not a public bill. It is much more difficult to distinguish between a private bill and petition than between a public bill and petition. Here again we can often be guided only by the discussion in the lower House. There is little to be found elsewhere on the finer points of procedure.

In taking up each point one must first combat the traditional view, for in nothing pertaining to the Petition does one meet with so many mistaken notions as in regard to the formal action taken upon it. Perhaps no notion is more firmly fixed than that in going by petition the Commons were turning back to the legislative procedure of the earlier time when all laws were initiated by petition and then afterwards put into the form of statutes. That was what Hakewill thought when Coke first made

[1] In 1610 the Commons presented a petition "touching Restraint of Speech" (C.J. 1:431). A diary for that Session calls it "a petition *de droit*" (*Parliamentary Debates in 1610*, 40). It is of essentially the same character as the Petition of 1628 being the result of conflict between a right of Parliament members and the King's prerogative.

his proposal. Why, he asked, should they go back to a method which had been abandoned two hundred years before?[2] But those who, on May 26, advocated giving the Petition the procedure of a bill were not harking back to the old way for they considered that going by bill or petition was not at all a matter of form but only one of procedure. "Itt is in the forme of a bill," one member pointed out.[3] It was in the form not of a public but of a private bill. Private bills have always kept the petitionary form;[4] in 1628 they were enrolled as petitions concerning private parties containing in themselves the form of acts.[5] As far as its form was concerned the Petition could be made either a private bill or a petition of right.

The first formal action taken upon the Petition was the three readings in the House of Commons. "Lett the petition," Rich moved, "have the solemnitie of a bill."[6] He was seconded by Wentworth. Without seeming to attach any particular significance to the procedure, the Petition was read twice and ordered to be engrossed.[7] It was not until the next day, after the third reading, when they were ready to send the Petition up to the Lords, that the issue was squarely faced. If the Commons endorsed the Petition with the words *Soit baille aux signeurs* they would thereby make it a bill.[8] According to Elsynge, it was by this endorsement that the Commons began to have any part in the action taken upon petitions, and by this participation they changed them from petitions to private bills.[9] Here again it must be noted as in its form, the resemblance is to a private not a public bill. The reasons given by those who wished the endorsement were two. First it would make it a law. This argument was advanced by those who still doubted the efficacy of going by petition.[10] The second reason was that it would strengthen the Petition. "I desire," said Wentworth, "nothing may be omitted to make this peticion to all posterity firme and free."[11] "We fell upon a petition," said Coryton, "but we all purposed to make it the strongest wee canne."[12] Perhaps Rich, better

[2] M, 153; B, 144; H, 5324:28; G, 3:75.

[3] Rich. B, 193.

[4] See McIlwain *The High Court of Parliament*, p. 223.

[5] *Rotutus Parliamenti de Anno Tercio Caroli Regis.* Printed in *Statutes of the Realm*, Intro., 77-78.

[6] M, 199.

[7] The readings were not recorded in the Journal in the same formal way as the readings of a bill. Instead of "L 1a" and "L 2a," the simple statement is made: "The Petition of Right twice read" (C.J. 1:905). The "petition *de droit*" referred to above (n. 1) received three formal readings. C.J. 1:431.

[8] Littleton. G, 4:112.

[9] "In the time of Henry 4, few petitions were directed to *the king and his council.* Some were directed to *the king* alone; some to *the lords* alone and some to *the commons.* But I find no answer by the commons. Only, if they were petitions of grace, the commons wrote this inscription over the first line, *viz. Soit baille as seigneurs pur parler a roy*; or *Soit parle a roy per les seigneurs.* The others were sent up to the lords without any direction; and here first began the private bills now exhibited in Parliament." Henry Elsynge. *The Manner of Holding Parliaments*, London, 1768, p. 287. It was written by Elsynge in 1625 while he was Clerk of Parliament. *Ibid.* Preface vii.

[10] Ball: "If there be that endorsement, it is a law; if not, I know not what fruit it shall have." M. 201.

[11] G, 4:106.

[12] M, 201.

than any one else, explained how the endorsement would strengthen the Petition. "This," he explained, "will witnes our assent to all posteritie, or else it may bee a question whether wee assented or not, there is noe other stampe of our assent; if wee would have the memoriall of this to endure to posteritie, lett it appeare by the record itselfe."[13] The Commons were trying to do two distinct things at the same time. They wanted the King's assent on record, but they also wanted the strongest possible declaration from the two Houses.[14] The reason they wanted the latter is obvious. Sir Edward Coke maintained that "whatsoever the lords house and this house have at any time agreed upon no judge ever went against it."[15] But though he made this claim, Coke was one of those who most positively opposed the endorsement. Aside from the objections (already enumerated) involved in going back to a bill, there was an added objection in regard to the King's answer.

The same subcommittee which had been appointed to report on how the Petition should be sent up to the Lords was also to report on how they should ask the King to give his assent. Though they could not come to any agreement on the first question, they were unanimous in desiring that the King give his assent in full Parliament. Coke maintained that it was part of the procedure of a petition from both Houses that it be answered in Parliament.[16] Such a petition was "no Whitehall case."[17] They must urge it upon the Lords as the proper procedure for their Petition.[18] But if it were endorsed, they could not ask the King to assent in Parliament without asking that he make it a law.[19] From the first there had been a desire to surround the King's promise with all the form and solemnity possible. Entirely aside from the question as to whether his answer given in Parliament would be more binding than if given at Whitehall, there was the question of the effect on the public. In the eyes of the outside world, pomp and ceremony would play an important part. The leaders by no means neglected a consideration of the probable effect upon the King of a wide spread knowledge of the solemnity of his act.[20] From

[13] M, 200 *verso*.

[14] In referring to the Petition a year later, Selden termed it "the Declaration of both houses of parliament, and the Answer of his Majesty to that Declaration." *State Trials* 3:265.

[15] M, 201. For the King's answer to this assertion see above p. 43, n. 65. [16] M, 202; B, 195; G, 4:114.

[17] M, 202. Petitions from the Commons alone were answered at Whitehall.

[18] Coke believed so strongly in the judicial functions of Parliament, he looked upon the Petition so entirely as a judicial act, that it seems fairly safe to conclude that any procedure proposed by him was judicial, not legislative.

[19] "This [the endorsing] being done," said Rich, "wee shall referr it to his Majestie either to answer it in Parliament and then it is an Act of Parliament, if ought of Parliament then it is but a petition." M, 200 *verso*.

[20] Upon his delivery of the Petition to the King, the Lord Keeper was to say: "It is the humble desire of both Houses, in respect of the great weight of the business, and for the strengthening of it, and for the more comfort of his loving people, that His Majesty would be pleased to give His Answer in full Parliament." L. J.3:827.

Pym came the proposal which solved the problem. "Lett it bee carried up indifferently," he suggested, "and lett the lords know that wee will present it to his Majesties grace to bee the one or the other."[21] But whichever he might desire to make it, said Pine, "to move that the King wold magnify himself soe much as in Parliament to give his consent."[22] It was so ordered by the House.[23] In sending the Petition up to the Lords, the Commons did not commit themselves decisively for either bill or petition.

On the same day as the Petition was sent up to the Lords, May 27, it received three readings there and, being put to the question, was assented to unanimously.[24] If such an action had no significance in the lower House neither had it in the upper. It was not decisive either way. At most we would naturally conclude that it was only yielding to the opposition on a nonessential point. Parliament considered that up to this time they had not committed themselves one way or the other. The King's answer becomes then the determining action. Regarding this answer there are three points to consider; the place, the time, and the form. The significance of the first has already been discussed. After some debate,[25] the Lords joined with the Commons in requesting that the answer be given in full Parliament.[26] The King complied. As far as ceremony was concerned the Petition was answered in exactly the same way as were bills.[27] We have not yet come to the parting of the ways.

The second point is the time when the answer was given. According to the usage of that period no law received the King's assent until the end of the Session. When the Petition was first proposed, Rich had pointed out that one of its greatest advantages was that they could have the King's answer before they decided on the bill of subsidies.[28] On the 27, Sir William Beecher again called this to their attention. "If we send it up with the Indorsement as a law," he pointed out, "we cold have no answere till the late end of the Parlament."[29] Against this view there was only one member who protested. "As for the Kings assent," claimed Ball, "though he now give assent, yet it is noe session,[30] and in 18 Jac. it was so resolved by the house."[31] The records for the Parliament of 1620-

[21] M, 201, *verso*.

[22] G, 4:114.

[23] "By question resolved that this Petition of Right shalbe sent up to the Lords as a Petition of Right, and they desired to joyne with us in presenting it to the King.

"2. Resolved: that the Lords shal bee desired to joyne with this house to desire the King to give his answer thereto in full Parliament." G, 4:115. See also C.J. 1:905-906.

[24] "*Hodie 1a vice* lecta est, the said Petition of Right. . . . *Hodie 2a et 3a vice* lecta est, the Petition of Right. Put to the Question, and Assented unto *per omnes, nemine dissentient.*" L.J. 3:826.

[25] *Ibid.*, 826.

[26] *Ibid.*, 827.

[27] Compare *Ibid.*, 835 and 843 with 879. This of course applies to the first as well as the second answer. The Petition for Religion presented by both Houses in 1625 was answered by a message instead of in this formal way. L.J. 3:465.

[28] M, 153; N, 147; H, 5324:28.

[29] G, 4:112.

[30] *It does not end the session*, is what he meant.

[31] M, 201.

21 do not bear out his assertion, but rather the opposite view.[32] That the Petition received the King's assent in the midst of the Session is indeed, to me, the strongest evidence that it was granted as a petition and not as a bill.[33]

It is, however, the third point that has always been considered the vital one. Most writers have claimed that the King's second answer made the Petition a law.[34] That answer was in the words, *Soit droit fait come est desire'*. The claim is based on the supposition that these words are a usual form of assent to a bill.[35] If that is true then it follows that a petition of right is a usual form of bill; the two things must go together. Is there any authority for such a supposition? In the time of Henry VIII, we find clearly set forth three kinds of bills, public, private, and money, with the stereotyped form of answer for each.[36] D'Ewes in his *Journal of all the Parliaments of Queen Elizabeth* gives the same three kinds of bills with the same answers.[37] There seems to be only one authority for including a petition of right among the several kinds of bills. That authority is a poorly recorded speech of Selden's on June 24, 1628. As a proof of the real character of tonnage and poundage, Selden pointed out that such a bill received the same form of assent as other money bills. In doing this he gave the forms of bills with their answers. As given in Rushworth his list includes petitions of right and the answer which he gives for it is that which the King had given to the Petition on June 7.[38] But

[32] The question arose when the King decided to adjourn the Session for the summer instead of proroguing it. He was willing to give his consent to some bills that were ready if that act would not bring the Session to a close. In both Houses and among the judges there was a sharp difference of opinion. The Lords wished to obviate the difficulty by passing "An Act that the King's Royal Assent to some special bills shall not determine the sessions." The Commons declined to consider this bill largely because, as a matter of policy, they did not wish the King to assent to any bills at the time; but there was also the feeling that in doing so a dangerous precedent would be established. For these proceedings see L.J. 3:146, 148, 150; C. J. 1:630, 633, 634, 638; Nicholas for 1621, 2:113, 137, 138, 139, 141.

[33] In 1625, under circumstances similar to those in 1621, an act, 'That this Session of Parliament shall not determine by His Majesty's Royal Assent to this and some other Acts,' was introduced and this time became a law. Before the Session was adjourned the King gave his assent to several bills. But the circumstances were very different from those surrounding the assent to the Petition of Right. It was immediately before an adjournment of considerable length, the assent was given in return for a money grant, and all the bills then ready were presented. It can hardly be considered as a parallel case to that of 1628. There was indeed special reason why, if the Petition was an act, it should have been passed with the bill of subsidy. The intention from the first had been that the two should go hand in hand. To that end supply and grievances had been referred to the same grand committee. C.J. 1:875.

[34] Gardiner: "The Petition of Right like every other statute . . ." (6:327).
Forester: "From this summer afternoon was to date the enactment of a law" (2:103).
Taswell-Langmead: "The King . . . gave to this . . . compact . . . the sanction of an Act of Parliament" (p. 439).
Gneist: "The King is compelled . . . to approve the declaratory statute" (2:236).

[35] Gardiner: "The clerk pronounced the usual words of approval" (6:309).
Hallam states that the King assented "to the bill in the usual form" (1:382).
Taswell-Langmead: "The king at length signified the royal assent in the customary form" (p. 439).

[36] L.J. 1:9.

[37] p. 35.

[38] "For public Bills, the King saith, *Le Roy veult*; for Petitions of Right, *Soit droit fait come est desire.* For the Bill of subsidies . . . " (1:628).

from the list is omitted entirely the private bill and its answer. That that was what Selden really gave instead of the petition of right is suggested by another version of this same speech which gives the regulation answer to a private bill.[39] Among all the modern writers on parliamentary procedure only one includes petitions of right among the several forms of bills; and he fails to cite any authority for so doing.[40] There does not seem to be then any basis for the assumption that a petition of right was a legislative procedure with a stereotyped form of answer.

That there was no regular form of answer for a public petition of right is further proved by the variety of answers considered at the meeting of the Council.[41] The use of English instead of the old Norman-French, the length, and the variety all show no knowledge of any existing model. The answer *soit droit fait come est desire'* was suggested not by the Council but by Parliament.[42] According to a contemporary writer they claimed that it was the "ancient form" of assent to a public petition of right.[43] Whether they had any basis of authority for such a statement,[44] or whether they arrived at their conclusion by a process of deduction, it is impossible to say. The latter would not have been difficult. There still remained the private petition of right with its stereotyped form of answer, *Soit droit faite a la partie*. With this form of petition, Parliament no longer had anything to do. But there was a form of petition remaining to Parliament; this was the petition of grace, which had become the private bill, and the stereotyped form of answer for which was *Soit fait come il est desire'*. What was more natural than to conclude that in the time when all petitions were presented through Parliament, the answer to the petition of right partook somewhat of the form still retained by the parliamentary petition? However that may have been, it is safe to conclude that the Commons modeled their proposed answer on the answers to a private petition of right and to a private bill.[45]

[39] "For public bills the king saith *soit fait come il est desire*; for the bill of subsidies" . . . (M, 270 *verso*). It is very evident that there is a serious omission in this record; it has left out the answer to the public bill and the kind of bill to which *soit* . . . is the answer; but that that is a private bill there can be no doubt.

[40] Sir Erskine May gives money bills, public and private bills, and then adds, "upon a petition demanding a right, whether public or private, *Soit droit come il est desire*" (p. 484). The authority he cites is D'Ewes who, as has already been pointed out, does not include this.

[41] For the full text of the proposed answers see Appendix C.

[42] In giving his second answer the King said, "I am willing to please you in words as well as in the substance." L.J. 3:843.

[43] Mead explained, in a letter he wrote on June 15, that the King "was told they desired the ancient form heretofore used by his ancestors." *Court and Times* 1:362 n.

[44] If there is any authority, modern writers on the subject have all missed it.

[45] Sir Wm. Anson gives this solution of the problem: "The Petition of Right is the only great public statute to which the royal assent was given in terms applicable to a private bill: and perhaps the Petition of Right may be regarded not so much as a statute making new law as an address of both Houses to the Crown that the ancient laws and statutes of the realm should be observed. It may be that to such an address it was not thought suitable to reply in the words of assent to a request or proposal for new legislation" (Pt. 1:287).

What then is the meaning of *Soit droit fait come est desire'?* Should it be translated *Let right be done as is desired?* This would make it a promise for redress of grievances. In giving the second answer the King said: "This I am sure is full, yet no more than I granted you in my first answer."[46] The first answer had been: "The King willeth that right be done according to the laws and customs of the Relme." . . . The wording of this taken with the King's assertion is sufficient proof that the judicial translation is correct. This is confirmed by the character of the other answers proposed at the Council meeting. Great as is the variety in these proposals, they all agree in certain points. They are all the King's promise that the law shall be observed. Some are much more explicit than others, some even limit the interpretation of the law as given in the Petition, but all are the King's promise for judicial remedy.

In the face of the contemporary evidence, one must admit at the very least that both answers were of the same character, that is that either they were both judicial or both legislative. Admitting that, another proof that the second answer was not legislative, that it did not make the Petition a statute, is to be found in the traditional interpretation of the first answer. Most writers assert that it was in reality a negative answer.[47] The contemporary evidence is all opposed to this view. The objection of the Commons was only that it was too vague, too ambiguous. It "hath no relacion to the peticion," said Pym, "the answere being left at large to the lawes, whereas we have in our peticion alledged certyene lawes."[48] "Lett his Majesty declare his meaning," said Rudyard.[49] "Not to desire a new answer," said Hobby, "but an explanation of that answer." Phelips, who felt that the answer had really come from Buckingham and not from the King, added, "an explanation of himself by himself, not of any others who make him to speak in oracles."[50] These objections show that they did not consider the first answer equivalent to a refusal or that it made the Petition ineffective; their only objection was to its vagueness. Vague as it was, there were those who upheld it. "There may be a possible interpretacion to make it good," said Pym.[51] "I do not hold it altogether unsatisfactory," was another's opinion.[52] But Coryton was most to the point: "The answer may receive various constructions, and so it may receive a good one and so I take it, but, howsoever the Lords and

[46] L.J. 3:844.

[47] Of the first answer Gardiner says that it "meant nothing at all. . . . . It was Charles's old offer of confirming the statutes whilst refusing the interpretation placed upon them by the Commons" (6:297).

Taswell-Langmead says that the first answer "was tantamount to a refusal to pass the Bill," whereas the second gave it "the sanction of an Act of Parliament" (p. 439).

They could not very well have come to any other conclusion. There could be no half way about a legislative answer.

[48] Pym, N, 188. "The petition cometh not home," is the way it was put by Hayman. G, 5:55.

[49] B, 222. [50] G, 5:47. [51] G, 54.

[52] Vaughan, G, 55.

Commons have agreed this to be our rights, and I think no minister of justice dare do to the contrary, and I think this may well satisfy."[53]

The belief that the two answers were opposed to each other, that the first was negative and the second positive, has undoubtedly been fostered by another equally mistaken notion. This is that the Commons forced the King to give the second answer by beginning immediately an attack upon Buckingham. The desire for a second answer was not the motive back of that attack. The connection between the two is quite different. The King offered the second answer in an attempt, futile as it proved, to stop that remonstrance. In order to remove this mistaken notion regarding the demand for a second answer it is necessary to give a detailed account of what took place in the House of Commons between June 2, when the first answer was given, and June 7, the date of the second. It is necessary even to go back much further in order to explain why the attack was made at this time. Forster, in his *Life of John Eliot*, tells how, four days before the Session began, the leading members of the lower House met together to formulate their plans. Eliot wished to revive the impeachment of Buckingham, but he was overruled and it was decided to proceed by bill as the better method of putting an end to the abuses.[54] Only after reading the debate of June 3, and the succeeding days, can one appreciate the restraint the Commons put upon themselves. "We never meddled with persons," said Selden, looking back, "we were upon the substance only."[55] As long as there had been the expectation of reaching the ministers by a law no protest had been made; but when the question arose of abandoning the bill with a penalty there was an immediate outcry. "We have declined," said Coryton, "seeking the punishment of those that have beene the cause of those breaches on our liberties, and if we have not examples made to deterre others from doing the like, then we must make a lawe to prevent the like for the future."[56] It was men like Eliot and Wentworth, the men most anxious to punish the ministers, who were the last to relinquish the hope of returning to a bill. From what followed it seems probable that, at the time the Petition was decided upon, they were promised by those favoring the Petition that as soon as that was safely out of the way they would be given the opportunity to make their attack. One can not but think that for many days Eliot had had his speech of June 3 prepared. Without waiting even for a discussion of the King's first answer, he sprang it upon the House.

Eliot's speech came, no doubt, as a great surprise to most of the members, and they naturally looked for the cause in what had immediately preceded it. "It is folly," said one of the King's supporters, "to conceal what every one thinks, this speech came from the scantnes of the Kings

[53] L, 39. [54] 2:1-2. [55] June 10. M, 237 *verso*.
[56] N, 125. "Either example or law must secure us." G, 3:13.

answer to our petition, let us apply ourselves to that and petition his Majestie for a fuller."[57] Eliot was quick to answer: "Where it is said that some distrust of the Kings answer caused this, I protest to the contrary, and I and others too have had this resolution to satisfy his Majesty therein, only we stayed for an opportunity."[58] Had the King given the more satisfactory answer in the beginning, the attack on Buckingham would, nevertheless, have followed. His answer had probably made it more bitter, but that was the only connection between the two. That the King believed that the attack was the result of his answer is evident from the character of his first attempt to stop the remonstrance. In a message delivered by the Speaker on June 4, he declared his resolution to abide by his answer to the Petition "without further change or alteration."[59] It was his announcement to the Commons that he would not be intimidated; if that was their purpose they might as well give up. Without making any comment on the message, the Commons proceeded with their regular business. The next day came a more peremptory message. They were ordered not to take up any business "which may lay any scandal or aspersion upon the state, government, or ministers thereof."[60] This message served only to intensify the feeling and to make the members speak more plainly. The Speaker became so terrified, when he found himself unable to stop the torrent of words, that, upon the House going into committee, he asked permission to leave. While the Commons proceeded to name Buckingham as the "grievance of grievances"[61] and the evidence was being heaped up against him, the Speaker was closeted with the King discussing their next move.[62] Upon his return, he immediately adjourned the House until the next morning. At that time, after explaining in very conciliatory terms the King's last message, he continued: "This day was appoynted to consider of his Majesties answer to our petition. I hope if wee find anie thing fitt for our comfort wee will lay hold on it, if not wee may seeke for a fuller answer."[63] The King had played his last card.

It may be said by some that even in spite of Eliot's denial, all that the Commons had done so far they had really done in order to force the King to make this offer. But that assumption is disproved by their refusal to take advantage of the offer. This is clearly demonstrated by the fact that the burden of argument was put upon those who wished to petition for another answer. "If it be declined now," said Alford, "it may hereafter be

[57] Sir Thomas German. M, 211 *verso*-212. [58] M, 212.

[59] O.P.H. 8:168. [60] *Ibid.*, 190. [61] Sir Ed. Coke. G, 5:26.

[62] Packer: "our Speaker gone to the King" (G, 5:38). "The Speaker having been three hours absent, and with the King" . . . (From a letter by Mr. Allured, a member, written on June 6, and printed in Rushworth 1:609-610). "The Speaker seeing the house so moved in the morning, and none scarce able to speak, and himself also in that condition, desired leave to go out a while, which was granted and he went to the King, and stayed with him till near 12 of Clock" (M, 218 *verso*).

[63] M, 219.

denied. . . . A good answer to this will bring good content to our country."[64] Eliot had given as the reason for not asking for a fuller answer, that it would involve conferences with the Lords which would consume a great deal of time. He suggested that they leave it to the King to make an explanation if he so desired.[65] To this Perrot[66] and Strangewayes[67] objected. How could the Commons expect an explanation from the King unless they let him know they were dissatisfied? Here the subject was left; no one had even suggested that it be put to the question. Instead that subject was dropped, and it was ordered that the grand committee for the remonstrance should sit.

By this time the remonstrance was pretty well in shape. On the day before, while the Speaker was absent, the heads had been decided upon. Now the Commons took up the detail. On the following morning there came a message from the Lords desiring a conference regarding the King's answer to the Petition. The motive behind the Lords' proposal was the same which had actuated the King, the hope of putting a stop to the remonstrance. "I believe," Bristol had said in support of the proposal when it was introduced in the upper House, "that those distractions and fears which since have sprung amongst us took their original from that answer."[68] This is seen also in the Lord Keeper's speech at the conference. The reason he gave for making the request to the King was "because the Lords conceive that the good intelligence between the King and his people depends upon the said answer."[69] The Commons returned to their own House to debate whether they should join with the Lords. Coryton disapproved of the haste with which the matter was being put through.[70] He moved "to have our answer to the Lords put off till Monday."[71] But Eliot, the leader in the attack on the administration, turned the tide when he gave as his opinion that "this proposition doth no way contradict that way we were in."[72] With the understanding that they should still go on with the remonstrance, the Commons joyfully accepted the proposal of the Lords. The second answer had not been forced from the King, nor had he gained anything by giving it. It must not be thought that the Commons had at any time shown an unwillingness to accept a second answer. The feeling had been only that by asking for another answer they would do their cause more harm than good. The harm such a request might do lay not alone in the effect it would have on their remonstrance, but in the effect it would have on the interpretation of the Petition.

[64] M, 220.

[65] "I assure myselfe his Majestie will explaine him selfe without our suit" (M, 220). See also L, 39; N, 187.

[66] G, 5:52. [67] G, 5:54-55.

[68] Gardiner, 6:308. He quotes from Elsing's Notes. [69] M, 224 *verso*.

[70] "There is no such haste (and not liked of)." L, 41. [71] G, 5:86. [72] M, 224 *verso*.

The Commons' chief reason for being reluctant about asking for a second answer had been their fear of failure. "If we should fail what interpretations abroad," one member had objected when the subject was first introduced.[73] Sir Edward Coke had expressed no opinion during the debate. After the second answer was received he explained: "I would not find fault with the last answer (I had so mutch wit in my head) till I were sure whether we should have a better one."[74] To have objected to the first would have been to have interpreted it. Until they were assured of an answer in which there was "no doubtfulness nor shaddowe of ambiguity,"[75] it was policy for them to interpret the only answer of which they could be sure in the light they wished the judges to interpret it. This, perhaps, more than any of the other evidence presented, proves the point that I have tried to make clear,—that the two answers did not differ, the first being negative and the second positive. The difference lay in this that the first was ambiguous, the second was clear. This conclusion can not be applied to answers to legislation, but it can be applied to answers to a petition of right.[76]

This account of the Progress of the Petition through Parliament has failed unless it has proved first, that whatever legislative action was taken did not prevent the progress of the Petition as a petition of right; and secondly, that the legislative action was that of a private and not a public bill. A private act is not a binding law. It is doubtful whether the Commons' lawyers, especially Coke, would have considered it as having as great force as a declaration of the law given by the two Houses in their judicial capacity and endorsed by the King. This latter is, moreover, the conception of the Petition which, I am convinced, was generally held at the time. There would, indeed, be little point in telling the story of the Petition's progress through Parliament, if afterward it had been treated as a binding law. In order, therefore, to determine the force of the Petition and Answer it is necessary to follow its course after June 7.

There are two things to consider in discussing the force of the Petition and Answer; first, the attempts to give it publicity and permanence; secondly, its interpretation by the judges. A consideration of the first will show that it was not treated as a public, or even a private, statute. When on May 6, the idea of going by petition had been first discussed the general idea had been that with the King's answer it should be used as a preamble

[73] Vaughan. G, 5:55.

[74] B, 225 *verso*-226.

[75] Sir Edward Coke. B, 226.

[76] Holburn in 1637. "It appears that the first answer was, that the laws should be put in execution; yet in the close there is put in a saving of the prerogative: but this Answere did not satisfy, and therefore there was a general answer *Soit droit fait*. But now what was granted by the last Answer more than the former, only that the law was left more absolute." *State Trials* 3:999-1000.

Heath in 1629. "A petition in parliament is not a law, yet it is for the honour and dignity of the King to observe and keep it faithfully." *Ibid.*, 281.

to the bill of subsidy.[77] The reason that Alford advanced for this was that the Parliament Rolls were not published;[78] by this means the King's promise would become known to the whole country. Ball pointed out that they would be following an illustrious example: "Soe it was in magna Charta and 28 of Ed. 3."[79] On June 9, the committee for the preamble of the subsidy bill reported that they favored publishing the Petition in that way only if another plan they had to propose failed. Coke, in his report, then added that if they inserted it in the bill they would not "enacte it."[80] Perhaps some had thought that in this way they might still make it a binding law. But the interest to us is that there would have been no point to this remark if the Petition had already been enacted.

The better plan advocated by the committee was "that this petition and answer bee published and to that end the Lords are to be mooved that it bee entred in the Parliament Roll,[81] and because perhaps that Roll may bee lost, seeing it is soe honourable for the King, to moove the King that it may be entred in the Courts of Justice at Westminster and allsoe that it bee printed."[82] The King[83] and Lords[84] having agreed to all parts of this proposal the next question was how it should be done? What seemed to worry them was how to get it entered in the Courts at Westminster. "It must be done," explained Coke, "by the King's writt reciting the peticion and commanding the judges to inroll this."[85] Later Selden gave the proceeding in greater detail,[86] the Lord Keeper reported the Commons' wish to the Lords, and the Lords gave the order;[87] from an

[77] Alford, M, 150; G, 3:58; Ball, M, 151 *verso*; G, 3:66. Phelips, B, 143 *verso*. [78] G, 3:59.

[79] B, 141 *verso*. Truly the bargain idea was as prevalent in 1628 as it had ever been when the King was forced to confirm the Great Charter.

[80] B, 231 *verso*.

[81] No particular significance can be attached to the fact that the Petition of Right was entered in the Parliament Roll; it does not help to explain its nature. With the fourth year of Henry VII the Statute Roll ceased. The need for it had ceased long before when bills took the place of petitions. From that time the Parliament Roll may be considered as having taken its place. But the latter kept its informal character through the Session of 1628; that is it still contained other proceedings as well as public and private bills. The Petition of Right, as printed in the *Statutes of the Realme*, is taken from the Parliament Roll. But it was not included there among either the public or private acts; instead it is placed first in a class by itself. The editors of the earliest printed editions of the statutes recognized this difference by not numbering the Petition; they put it first but numbered the next chapter 'I'. Later editors failing to see the significance, numbered the Petition '(I)' and the next chapter 'I(II)'. *Statutes of the Realme*. Introduction.

[82] M, 230.

[83] The King's consent was delivered only by word of mouth, being given by Sir Humphrey May. C.J. 1:910; B, 232; M, 229 *verso*.

[84] L.J. 3:851. [85] G, 5:149. [86] M, 260 *verso*; B, 270 *verso*.

[87] C.J., 1:915. It is very doubtful whether this order was ever carried out. The fact that it was left to Attorney Heath to see that it was done is sufficient to raise one's suspicions. That the Lords did nothing to enforce the order is suggested from the fact that the order is not recorded in their Journal. That the Commons themselves had doubts is seen from the committee appointed at the opening of the next Session "to search, whether the Petition of Right, and his Majesty's Answer thereunto, be enrolled in the Parliament Roll, and in the Courts at Westminster, according to his Majesty's Pleasure, signified the last Session" (C.J. 1:920). Though this committee met (*Ibid.*, 921, 923, 924), there is no record of its having made any report. Probably this committee was suppressed as was that for investigating violations of the Petition. Added to this we have the negative evidence that the Petition is not to be found in either the Rolls Chapel or Petty Bag series of *Certiorai* bundles for this period.

examination of all these accounts there can be no doubt as to what the proceeding was. By the writ of *Certiorari* addressed to the Clerk of Parliament, the Petition would be certified into Chancery and from there it would be sent by a *Mittimus* into the other courts.

This was an ordinary procedure with private acts which were "not enrolled without special suit, as general acts are."[88] And the private act "is thereby made a record and bindeth the party whom it concerneth and all others."[89] But the point of interest in connection with the Petition is that in having it certified the Commons were not following the precedent of procedure for a private bill. As was suggested above, the Commons were in a good deal of doubt as to how they should proceed to get the Petition enrolled in the Courts. A committee of the most eminent lawyers was appointed to search for precedents.[90] Doubt was expressed as to whether the Lords would agree to the procedure they proposed.[91] The first precedent which was advanced by Coke was, "20 Ed 3, *Lune post fest Epephaniae magnum placitum inter* Gilb [ert] Clar Erle of Gloster and Bohum Erle of Essex." Coke explained that "when judjment was given betwixt them, both were fined: and by the King's writt the Judgment was sent to the 3 benches to be enrolled there."[92] This same precedent was quoted in 1637 by Littleton, then the King's sollicitor-general, as authority for the King's writ to collect shipmoney; for that case in 1292, he said, proved "the king is '*Recordum superlativum et praeexcellens*'."[93] For his second precedent Coke cited "28 E. 1 rot. clausa memb. 2. There is a writt to inroll Magna Charta, and to see it observed."[94] Neither of these was a legislative act; more than that, each was the act of the King without the Lords and Commons.

Coke very significantly added: "This Peticion is a branch of Magna Carta: and fitt to follow that Presedent."[95] And what kind of an act had a confirmation of Magna Carta been? Not legislative certainly, but a promise on the part of the King that the law should be put in execution. This is the way, at the close of the Session, the King referred to his act, using such phrases as "what I granted in your petition" and "anything I have promised you."[96] A year later Heath said of it: "No other construction can be made of the Petition, than to take it as a confirmation of the ancient liberties and rights of the subjects."[97] In 1637 Judge Hol-

[88] Lord Hobart in 1617. Quoted in *Statutes of the Realm.* Intro. p. 35, note 5.

[89] Elysinge. *MS Cott Titus* B.V., p. 69. Quoted in the same note as above. See also the pamphlet *Privileges and Practices of Parliament*, 1628.

[90] C.J. 1:912.

[91] Eliot: "Lett us send to the lords about sending of it in to the Courts of Westminster; and if they make any doubt, that we have a conference about the manner." M, 260 *verso.*

[92] G, 5:149. See also M, 239 *verso.*

[93] *State Trials* 3:924. [94] M, 239 *verso.*

[95] G, 5:150. [96] L.J. 3:879. [97] *State Trials* 3:281.

born made the same assertion that the King promised "the laws should be put in execution."[98]

If this was the case what had the Commons gained by refusing a bare confirmation, by going a weaker way in order to include their explanation? The interpretation of the Petition by the judges shows the value of stating the particular grievances. The two most important cases are the proceedings against the members of the House of Commons in 1629 and the shipmoney case in 1637. In both the Petition held good as the King's promise for the redress of the particular grievances against which protest had been made, but for anything more than that the judges went back to the laws cited in the Petition. That it was no longer possible to imprison a man without showing any cause whatever, was determined by the Petition; but it did not determine whether the cause shown in 1629 was one "to which they might make answere according to the lawe." So in 1637 it did not determine whether ship money was against "the lawes and free customes of the realme." As a practical measure its efficacy was limited to the grievances complained of; the general statements were not binding on the judges.

The blame for this narrow interpretation of the Petition has been laid upon the judges. "They refused," says Gardiner, "to be arbitrators between the King and the nation. . . . All that had been gained by the Petition of Right seemed to be lost in an instant."[99] But had not the judges done all that they could do, all that the Commons' lawyers had claimed they could do? As a petition of right (or, for that matter, as a private act), the Petition could cover only the particular grievances enumerated. By his answer, the King pronounced that these particular practices were illegal.[100] But before giving his answer, he took special pains to find out from the judges whether they, as well as the Houses of Parliament, considered them as illegal.[101] The Commons had, indeed, been forced to a compromise. Their resolutions had stated the general principles. The King's promise, as contained in his message, had been too vague to assure the enforcement of those principles. So as a middle way the Commons chose to have declared illegal specific violations of those principles. In this way they gained temporary relief for the country. But that was not all they had done.

[98] *Ibid.*, 999. Sir Robert Berkley: that the Petition "only confirmed the ancient liberties." *Ibid.*, 1109.

In his *Constitutional History*, Brodie says "our ancestors . . . deemed it merely a confirmation of the acknowledged law of the land, which had been so grossly violated" (1:475).

[99] 7:123.

[100] Dicey says of the Petition that it was a "judicial condemnation of claims or practices on the part of the Crown which are thereby pronounced illegal" (p. 195, n.1).

[101] In 1637 Judge Crook said: "it [the Petition] was referred to my lords the judges (most whereof are here) whether this law doth give more than formerly from the king. And we were all of opinion, that this law did give no more than what was formerly, and was only but a reviving of the ancient privileges of the subject; it added no more, but only revived what was formerly granted." *State Trials* 3:1134.

In spite of the fact that they could not be enforced, it is the general principles enunciated in the Petition which make it a mile stone in the development of constitutional government. Dicey makes the statement that "there is no difficulty, and there is often very little gain, in declaring the existence of a right to personal liberty. The true difficulty is to secure enforcement." For this reason he would place the Habeas Corpus Acts above the Petition of Right.[102] This is certainly to depreciate the work of the men of 1628 who only with the greatest "difficulty" succeeded in placing on record their declaration of "the existence of a right." For that was their great work, that they succeeded in making the Petition a permanent record, that they succeeded in having that record spread broadcast over the country. It performed its mission by educating public opinion, by keeping the issue clear as between King and Parliament. Could the enforcing laws have followed if it had not paved the way?

[102] *The Law of the Constitution* 217.

APPENDICES

APPENDIX A

THE COMMONS' RESOLUTIONS, WITH NOTES SHOWING THE ALTERATIONS MADE IN THE HOUSE

1.[1] Resolved, upon Question, That no free Man[2] ought to be committed, or detained in Prison, or otherwise restrained,[3] by the Command of the King, or the Privy Council,[4] or any other, unless some Cause of the Commitment, Detainer, or Restraint be expressed,[5] for which, by Law, he ought to be committed, detained, or restrained.[6]

2. Resolved upon Question, That the Writ of *Habeas Corpus*[7] may not be denied, but ought to be granted to every Man[8] that is committed, or detained in Prison, or otherwise restrained,[9] though it be by Command of the King, the Privy Council, or any other, he praying the same.

3. Resolved, upon Question, That if a free Man be committed, or detained in Prison, or otherwise restrained, by the Command of the King, the Privy Council, or any other, no Cause of such Commitment, Detainer, or Restraint, being expressed, for which, by Law, he ought to be committed, detained, or restrained, and the same be returned upon an *Habeas Corpus*, granted for the said Party, that then he ought to be delivered, or bailed.[10]

4.[11] Resolved, upon Question, That the ancient and undoubted Right of every free Man is, that he hath a full and absolute Property in his Goods and Estate;[12] and

[1] The readings on the first three resolutions are given only in H, 2313:43-44.

[2] First reading, *That no subject being a free man.*
Second reading, *That no free man of England.*

[3] First, *committed or detained in prison.*
Second, *committed, restrained, or detained in prison.*

[4] First, *the King or the Council.*

[5] First, *without a special cause of the Commitment be expressed.*

[6] First, *besides the command.*
This last change was made at the suggestion of Sir Robert Cotton who maintained "that no commitment by the command of the King, the Council, or any other [without the cause being expressed] is a just cause of commitment."

[7] First, *A Habeas Corpus.*

[8] First, *every free man.*

[9] "Sir Nath. Rich would have *otherwise restrained* left out, because if a man be committed to the custody of a pursevant or any other man; he then saw not to whom the writ of *Habeas Corpus* should be directed, which used to be directed to the keeper of some gaol."

[10] First reading. *If upon a writ of Habeas Corpus granted the returne of the cause of commitment or detention in prison or other restraint of liberty of the person, for whom the said warrant is granted, be the command of the King, or the Council, or any other, which is no sufficient cause in Law, and the same be returned upon a Habeas Corpus granted for the party that then he ought to be delivered or bailed.*

[11] The fourth resolution was the first decided upon in Committee. When, however, it was later brought into the House with the other three there was objection made to it, due largely, no doubt, to the fact that its phrasing was not in harmony with that of the others. After some debate upon the wording, it was recommitted and later reported in the form given in the Journal. Both *Borlase* (21 *verso*) and *Harl.* 2313 (p. 7) give it as agreed to on March 26. The later account gives the changes suggested on April 3 as also the final form.

[12] First reading March 26. *That the subject of England hath such propriety and right in his own goods according to ancient custom.* B, 21 *verso.*
Mr. Selden (April 3). That instead of *subject of England*, they should put in *free man.* H, 2313:56.

that no Tax, Tallage, Loan, Benevolence, or other like Charge,[13] ought to be commanded or levied by the King, or any of his Ministers, without common Assent by Act of Parliament.[14] C.J. 1:878-879.

[13] First reading (March 26). *no levy nor tax.* B, 21 *verso.*
Second reading (March 26). *charge* added. H, 2313:7.
Debate on April 3. H, 2313:56.
MR. SELDEN. To leave out the word *charge.*
SIR ED. COKE. To put in the word *loan.*
SIR NA. RICH. *loan by authority.*
SIR RA. HOPTON. *tax, tallage, or coercive loan.*

[14] First reading (March 26).
without his consent in Parliament. H, 2313:7.
without Act of Parliament. B, 21 *verso.*
Debate on April 3. H, 2313:56.
SIR TH. HOBBY. To leave out the word *Parliament.*
SERJ. HOSKINS. *without his own consent otherwise than by Act of Parliament.*
MR. PINE. *otherwise than by the common law of England, or an Act of Parliament.*

APPENDIX B

THE BILL OF RIGHT

An Act for the better securinge of every free man touching the proprietie of his goods and libertie of his person.

Whereas it is declared and enacted by Magna Charta that noe free man is to bee convicted, destroyed, etc., and whereas by a statute made in E:1. called *de tallagio non concedendo*: And whereas by the Parliament 5 E: 3 and 14 E: 3 and 29 E: 3 etc., And whereas the said great Charter was confirmed and that the other laws etc. Be it enacted that Magna Charta and the same acts of explanation and other the Acts bee putt in due execution and that all judgments, awards, and rules given are [or] to be given to the contrarie shall bee voyd. And whereas by the common lawe and statutes it appeares that noe free man ought to bee committed by Command of the King, etc.; and if anie free man bee soe committed and the same returned uppon an habeas Corpus, hee ought to bee delivered or bailed. Bee it now enacted that noe free man shall bee committed by the command of the King or the privie counsell but the cause ought to bee expressed and the same beeing returned uppon an habeas Corpus, hee shall bee delivered or bailed; and whereas by the common lawe and statutes every free man hath a proprietie in his goods and estate as no taxe, tallage, etc., Bee it now enacted that noe taxe, tallage, loane, shall be levied, etc. by the King or anie minister without act of parliament and that none bee compelled to receive anie soldier into his house against his will, etc. (M 137).[1]

[1] Because of the nature of the source, it is impossible to say whether this bill is the first form, as presented by Sir Edward Coke on April 29, or its form after it was altered on the next day so as to agree "as neere to the words of the Stattutes as may bee" (B, 120 *verso*). In its recitation of the list of statutes it is both incomplete and faulty. The incompleteness is seen from comparing the list with that given by Sir Edward in his report on the 29th and the lists given in Grosvenor and H, 5324 on the 30th. From the same sources it is evident that 29 E:3 should read 28 E. 3. These errors make one question the value of the whole document.

APPENDIX C

PROPOSED ANSWERS TO THE PETITION OF RIGHT

To which petition
Our soveraign Lord the Kinge, in full parliament, makes this answere

Since both the Lords and Commons have severally with dutifull respect to us, declared ther intentions, not to lessen our just powre or prerogative, as ther Soveraign
We doe as freely declare our clere intention noe way to impeach the just liberty of our subjects.
And therefore this right understandinge beinge nowe soe happily setled betwene us and our people, which we trust shall ever continue
We doe freely graunt, that this petition, shall in all points be duly observed, as is desired.

Or thus
We doe grant and declare, that all things conteyned in this petition be done and observed, accordinge to the Lawes and ancient coustomes of this Land, for which noe man hereafter shall have cause to complaine.

Or thus
That noe man shall be compelled by imprisonment or otherwise, to contribute to Loans, benevolence, or other like charges, but by common consent in parliament.
That when any man shall be committed or otherwise restreyned, the true cause thereof shall be expressed uppon the committment, or at least uppon the habeas Corpus, shalbe retourned or signified to the Judge, to the ende they may proceed accordinge to the Lawe.
That noe souldyers or marriners gathered together for the Kings service, shall be billetted or sojourned but in place convenient and neer to ther Rendevous: and then but for such time as shall be necessary for the publicke service, during which time, theyr enterteynment shall be justly payd for, and themselves orderly governed.
That noe Commission of Martiall Lawe, shall be awarded or exercised in times of peace: Nor in times of warr or preparations for warr, but uppon such only as are in the Kings pay, for his Armys or Fleets: and yet they shall not therby be exempt from the ordinary Justice of the Kingdom.
All thes things, the Kinge himself will religiously observe, accordinge to his oath taken at his coronation And will cause all his officers and Ministers to observe the same, according to the Lawes and Statutes of the Land.
And if anything have been done to the contrary it shall not hereafter be drawen into consequence or example.
And nowe ther beinge a Right understanding betwene the King and his people: he doth assure them in verbo regio, That as the Lords and Commons have severally by ther Speakers, expressed ther duitifull respecte to him, that they have noe intention to lessen the just prerogative of ther Soveraign: Soe the Kinge clerely and freely expresseth himself, that neather in thes particulars nor in any other he will impeach the just libertys of his subjects (St. P. Dom. Chas. I, vol. 105, no. 95).

To which petition
Our Soveraign Lord the Kinge, in full parliament Aunswereth thus

1. That noe man shall be compelled, to make or yeld, any Loane, Benevolence, or such like charg, but by common consent in parliament.

2. That noe free man shall be committed, or deteyned but the true cause therof shall be expressed accordinge to the Lawes.

3. That noe souldyers or mariners shall be compelled to be sojourned, to the burthen of the people, and such as are nowe soe sojourned shall be speedily removed: as is desired.

4. That noe Commissions of Martiall Lawe shall be executed within the Land in times of peace, and such as are graunted already, shalbe forthwith revoked.

5. That if any thing hath been done to the contrary it shall not hereafter be drawen into consequence or example.

6. That the King doth hereby declare, that all his officers and ministers in the things aforesaid shall serve him according to the lawes and statutes of this Relme, as they tender the honor of the King and the prosperity of the Kingdom.

And if his Majesty shall soe thinke fitt; eather by himself: or by my Lord Keeper he may be pleased

To thanke both houses, for ther respectfull carriage towards him; that by ther severall Speakers, they have expressed themselves, that they have noe intention to lessen his Majestys just power or prerogative.

And that his Majesty againe on his part doth acknowledge that he hath noe powre but from God; nor will extend his prerogative beyond the just bounds therof, nor use it to other purpose but for the good government, protection and safety of his people.

To take Knowledge, with approbation, of the moderation of both houses, that they have not in this parliament, fallen uppon personal questions, which might have diverted them from matters of realitye.

And that his Majesty, taking Knowledge, that in all times somethings doe and will happen which may be amended, he will take such Knowledge of things amiss, for the future; that his people shall discerne his care to be such for the governing of the great affaires of the Kingdome as they shall have noe just cause of complaint.

And that his Majesty will manifest his desire unto them all: That ther being nowe a right understanding betwene him and his people, which may remove all jelousy and misundertakings on eather side

They will confide on him and trust to his Justice, and providence for ther safetye and prosperitye: As he will repose himself with confidence uppon ther loyalty and Loves; and shall willingly doe nothing but what shall tend to the honor, safetye, and happiness, of the Church and Commonwealth (*Ibid.*, no. 97).

To which petition preferred to the Lords and Commons our soveraign Lord the King, in full parliament, awnswereth thus

1. That noe man shall be compelled by imprisonment or other restraint, to make or yeld any guift, loan, Benevolence or other like taxe or charge, but by common consent of parliament: nor shall otherwise be molested or disquieted concerning the same or for refusall thereof.

2. That noe man shall be imprisoned or restreined by us or our privye counsell, for any cause which, in our conscience, doth not concerne the publike good and safety of us and our people, and in all cases of this nature, we shall readily and really expresse the true cause of the committment, as soon as with safety to the cause it is fitt to be disclosed and expressed and that in all causes criminall of ordinary Jurisdiction, our Judges shall proceed to the deliverance or baylement of the prisoner, according to the known and ordinary rules of the Lawes of the land, and in cases of extraordinary nature and consequence (when they shall happen) we will proceed with all conve-

nient expedition, and will never use our powre but with that moderation as shall be for the publike good and safety of our people.

3. That the souldyers and mariners nowe billetted in severall places, shall with all speed be disposed of and removed as is desired And from henceforth noe souldyers or marriners shall be soe billetted, but in convenient places neer the ports, wher an Army or Fleet is to sett forth or retourn holme for the publike service, and for such time only as the necessity of the service shall require; for which reasonable allowaunce shalbe payd; during which times and uppon which occasions, they shall bee soe ordred and governed, as that hereafter they shall be noe burthen or grievaunce to the people.

4. That the Commissions for Martiall Lawe complained of shall be, forthwith revoked and adnulled; and noe Commissions of like nature shall issue forth hereafter to be executed within the land in times of peace, but for the necessary discipline of the souldyers and marriners which shall be pressed and gathered togeather for the Kinges service, and to be exercised uppon them only; and yet shall noe way extend to priviledge them from the ordinarye Justice of the Kingdome.

5. That if any thing have been done to the contrarye, to the prejudice of the people in any of thes things, it shall not be drawn into consequence or example.

6. And lastly his Majesty is gratiously pleased and he doth hereby declare his royall pleasure to be, that all his officers and ministers in all the things aforesaid, shall serve him according to the Lawes and customes of this Relme, as they tender the honor of the Kinge, and prosperity of the Kingdome (*Ibid.*, no. 98).

To which Petition preferred by the Lords and Commons
Our Soveraigne Lord the Kinge in full parliament:
Awnswereth thus

1. That noe man hereafter shalbe compelled by imprisonment or other restreint to make or yeld any guift, Loan, Benevolence, or such like taxe or charge; but by common consent in parliament And that none shall be called to make such oath, or to give attendaunce, or be confined, or otherwise molested or disquieted, concerning the same, or for refusall therof.

2. That noe free man shall be committed or deteyned in prison, but accordinge to the Lawes, and customes of the Kingdom.

3. That the souldyers and mariners nowe billetted and sojourned in severall parts and places, shall forthwith be removed and discharged, and the people shall not have cause of greivaunce in this particuler in time to come.

4. That the Commissions alreadye graunted for martiall lawe, to be executed within the land shall forthwith be revoked and adnulled; And noe Commissions of like nature shall issue forth hereafter, to be exercised within the land in times of peace but uppon such as are in his Majestys pay and they not to be therby exempt from ordinary Justice.

5. That if any thing hath been done to the contrary, to the prejudice of the people in any of thes things, it shall not be drawne into consequence or example.

6. And lastly his gratious will and pleasure is, and he doth hereby declare his royall pleasure to be, that all his officers and ministers, in all the things aforesaid shall serve him, accordinge to the Laws and coustomes of this Relme, as they tended the honor of the King and the prosperitye of the Kingdome.

[On dorse] The King willeth that right be done according to the lawes and coustomes of the Relme. And that the Statutes be put in due execution that the subjects may have noe excuse to complaine of any wrong or oppressions contrary to ther just rights and libertyes.
To the prosecution wherof he holds himself in Justice obliged, as of his prerogative.

[Endorsed] Awnswere to the petition by the King in parliament (*Ibid.*, no. 99).

APPENDIX D

BIBLIOGRAPHICAL NOTES FOR THE PARLIAMENT OF 1628

I. Sources

A. Documents

(1). Petition of Right. Statutes of the Realm, 6:23-24.
(2). Drafts of a first answer. St. P.Dom. cv., 95, 97, 98, 99.

B. Records of Proceedings and Debates

1. OFFICIAL

Journals of the House of Lords.

This was the official record not only of what happened in the upper House but of all matters which concerned the Parliament as a whole. For this subject its particular value is to be found in the full accounts it gives of the conferences between the Houses.

2. QUASI-OFFICIAL

(1). Journals of the House of Commons.

The journal kept by the clerk of the lower House was not at that time deemed official. As printed it gives the appearance of being a much more formal document than it really was. The original manuscript indicates at a glance what the journal was, the fragmentary notes of the clerk jotted down during the proceedings.[1]

(2). Separate speeches and reports given out by the clerk.

It was the custom at that time for the clerk to sell to the members copies of the King's messages, and of formal reports or speeches when so ordered by the House. These copies, and copies of copies, are still to be found in great numbers, separately and in collections. In the collections are also copies of speeches which were doubtless given out by the members themselves. It is impossible to draw a sharp line between the two. All the originals from which the clerk made copies were undoubtedly preserved at the time by him, but only the *Journals* have come down to us. The *Journal* itself is therefore the only clue as to which were official separates. It would, I think, be safe to exclude from that list all speeches by members made in the course of debate. There are many of these collections of speeches in manuscript. The only one in print is *Ephemeris Parliamentaria*, edited by Thomas Fuller, and printed in 1654.

3. UNOFFICIAL

a. Public

During this period the circulation of parliamentary news was officially forbidden; yet, so slack was the enforcement of this command that little happened within the Houses that was not immediately known by the Court on the one hand, and the Country on the other.[2] But such information was necessarily circulated in manuscript. All

[1] For a full account of the nature of the Commons' *Journal*, see the introduction to Notestein and Relf, *Commons Debates 1629*.

[2] When the King's propositions for supply were brought into the House and it was decided that every man should have a copy, Secretary Coke moved that none be distributed outside of the House. There was considerable opposition to this motion by members who wished to consult with their constituents. B, 19 *verso*-20; H, 2313:3; N, 7.

that were printed at the time were a few separates authorized by the King.[3] Besides the many copies of separates, there are to be found in manuscript copies of proceedings which bear a marked resemblance to the news-letter of the Civil War period. Of these news-letters there are two, the *True Relation* and the *Borlase* account.

(1) The True Relation.

This news-letter is made up of a combination of separates, both official and private, and of narrative consisting mostly of debate and motions. The many copies of it which are to be found differ from each other both in the number of separates and in the fullness of the narrative, suggesting that its completest form was the result of a gradual accumulation from different sources. The final compilation could not have been made until after the Session was over, though probably from fragments given out before.[4] Of the many copies I have attempted to make no complete list, nor have I tried to make a classification. It is sufficient to note some of the copies of the most complete form, all of which are identical except for copyists' errors. One of them is to be found in the Cambridge Library (Rawl. A, 78); another in the Petyt Collection in the Inner Temple (537:26); a third belongs to the Marquis of Bute; a fourth to the Massachusetts Historical Society; and a fifth is among the Harleian MSS (4771). This last is not complete, wanting any narrative after May 26. There is no good copy of the *True Relation* for this Session in print. That in Rushworth's *Collections* (vol. I)[5] is very fragmentary. The editor of the old *Parliamentary History*[6] has used Rushworth as a basis and added to it from any separates he could pick up, some from *Ephemeris Parliamentaria*, some from a manuscript which had originally belonged to a member of this Parliament,[7] some from a collection of printed pamphlets.[8] For the debate he obtained additional material for June 5 and 7 from a manuscript in the Harleian Collection.

The manuscript which I have used is that belonging to the Massachusetts Historical Society. It has been in their possession since 1791, when it was presented to them by Thomas Wallcut, who bought it in the previous year at the sale of L. Byles. To judge from the handwriting it is a contemporary copy. More than that of its history is unknown. Probably it was brought to America by one of the early members of the Massachusetts Bay Company. If so, it becomes an interesting illustration of the close connection between the history of our own country and that of the early Parliaments of Charles I.

(2) The Borlase MS (Stowe 366).

This is another account of the Session which was written for circulation. It has every appearance of having been a daily news-letter. The manuscript is in the handwriting peculiar to the clerks of that time, it changes from time to time, as often as not in the middle of a day. Scattered through the text are little notes of description or explanation which go far to prove that the letters were written for circulation

[3] The editor of the old *Parliamentry History* refers to a collection of printed pamphlets made by Sir John Goodrich (7:403). A few such separates may be found in the Bodleian Library.

[4] For a full account of the nature of the *True Relation* see the introduction to Notestein and Relf, *Commons Debates 1629*. For that Session a detailed comparison was made of all the copies in order not only to give the best possible text but also in the hope of discovering their relation to each other, and the character of the whole. The different copies vary as much in their titles as in any other particular. We chose *True Relation* as being the most distinctive of the many given. Coming then to the same kind of account for the earlier Session, and finding again a great diversity of titles, it seems the natural thing to refer to them, too, as the *True Relation*.

[5] Edition of 1721.

[6] This collection of source material was published in 1751. The part pertaining to this Session is to be found in volumes vii and viii.

[7] Sir John Napier MS.

[8] See above note 3.

outside of the House. This is confirmed by the style which is much more entertaining than that of the private diaries; the humorous incidents are made the most of.[9] There can be no doubt that it was issued daily; for, though the leaves are now carefully pressed out and bound together, one can easily see that those for each day had been folded together, once each way, and then the date written across the outside. The grime on the outside indicates either that they were handled a great deal, or else not bound for some time after. Bound with the debates are some separates. They are never incorporated in the text as in the *True Relation*, a fact which brings out the most marked difference between these two accounts both of which were written for circulation. The *True Relation* was compiled after the separates were available; this was issued daily, and the separates sent later as they were obtained. The *Borlase* separates are not always on the same size paper as the daily proceedings, and each is folded and tabulated by itself. There is no means of telling how wide a circulation this news-letter had. The name on the title page of this copy, *William Borlase, Knight,* indicates only the owner of the bound copy. He was a member of the Parliament of 1628. The only other copy of which I know is also in the Stowe Collection (367). It is in one handwriting throughout and was evidently made after the end of the Session. It appears to be a copy of the *Borlase MS* made, perhaps, after that had been bound.

b. Private

From what is known of the Parliaments of this time, it is probable that notes of the proceedings were taken by many of the members. It can not be supposed that nearly all of those written during this Session have yet been brought to light. There are at present only four of which I know.

(1) Sir Richard Grosvenor. Notes of Proceedings (Library of Trinity College, Dublin).

As it is now preserved this diary consists of four closely written note-books, the contents of any one of which would fill a hundred printed pages of ordinary size. They cover the proceedings from April 18 to the close of the Session. There was, undoubtedly, a first book which is now missing.[10] That the diary is by Sir Richard Grosvenor, there can be no doubt. The writer's frequent reference to the committees of which he was a member, as well as the scratchy notes he makes of his own speeches, places this beyond question. This diary, more than any other account of the Session, gives one the proper sense of proportion. It deals not alone with the debates on "the great question," but with the other matters too, which were the subject of discussion. Considering the number of speeches recorded it is the fullest account. But a comparison with the other accounts proves that even it was not complete.

(2) Notes, by _____ (*Harl.* 2313, 5324).

These are two finely written note-books; the first covers from March 26 through April 28; the second begins with April 30, gives every day's proceedings through

[9] On May 31, when the Commons had been denied their Whitsuntide recess in the hopes that they would finish their work on the bill of subsidy, there occurred a debate on the question whether Oxford or Cambridge should be named first in the bill. Even the most prominent and serious minded of the members acted like schoolboys deprived of a holiday. This debate is recorded only by this writer and Grosvenor. A comparison of the two accounts is sufficient to make one realize the news-writer's ability in working up farce-comedy.

[10] At the beginning of the first book that we have, the author has written "2d booke." The loss of the volume occurred previously to 1745 when the books were catalogued as they are now. They are in one of the presses which contain Archbishop Ussher's manuscripts, and so probably belonged to him. In the *Life of Archbishop Ussher*, published by Richard Parr in 1686, there is given an account of the disposal of all of his manuscripts which were not in his own handwriting. After the death of the Archbishop

May 24, and then, after a few intervening blank pages, gives a fragment for June 4.[11] The only possible clue to authorship in the dairy itself, is in the handwriting. The only external evidence is in the name plate to be found in the front of each book. This reads: "John Duke of Newcastle, Marquis and Earle of Clare, Baron Haughton of Haughton, and Knight of the Most Noble Order of the Garter." The titles belong to the 18th century family of Pelham-Holles. There were both a Pelham and a Holles in this Parliament. One would like to think that the diary was written by the latter, the Denzil Holles who in the next Session made himself so well known. The handwriting bears out this supposition to some extent. The writer, whoever he was, had the rare talent of putting the gist of things into a few words. His narrative is especially valuable for committee meetings, for some of which he gives the only account.

(3) Nicholas's Notes. St.P.Dom. Chas. I. xcvii.

This diary covers practically the whole Session, but for the last month it is not as satisfactory. Even for the earlier part it is far from complete. The writer seems to have noted down only what especially interested him. Sir Edward Nicholas was a prominent member of the court party.

(4) Lowther's Notes. Hist. MSS Comn., 13th Rep.App.7, pp. 33-60.

These notes cover but a short part of this Session, from June 4 to the end, but for those days are quite full. Their chief contribution is the light they throw upon the much disputed question of the relation of Tonnage and Poundage to the Petition of Right. The editor of the Report, J. J. Cartwright, has worked out the authorship from internal evidence. From a comparison of an entry for June 1, 1626, with an entry for the same date in the *Commons' Journal* he has proved that the writer of the *Notes* was a "Mr. Lowther." But whether it was John or Richard it is impossible to say. Neither one was a conspicuous member of this Parliament.

C. Contemporary Letters

(1) Sir Francis Nethersole to Elizabeth, Queen of Bohemia.
Cal.St.P.Dom. Charles 1. 1628-1629.

Nethersole was one of the King's most ardent supporters in the lower House. His letters contain many valuable side-lights on the proceedings.

(2) Allured to Chamberlain, June 6. Rushworth I, 609-610.

This member's letter gives a vivid picture of the exciting events of June 5.

(3) Court and Times of Charles First, 2 vols. London 1848.

This work is made up of contemporary letters. The first volume contains many that have a bearing on this Session. Perhaps their greatest contribution lies in this,—that they reveal what was known by the general public at the time.

(4) Salvetti Correspondence. Hist. MSS Comn.11th Rep.App.1.

These are the letters of the representative of the Grand Duke of Tuscany at the English Court. They are not important for the information they contain for they treat but briefly of the Parliamentary proceedings. Their interest lies chiefly in the continental view-point of the writer as applied to the subjects which make up the Petition of Right.

in 1655, they were bought from his daughter for the University of Dublin. Awaiting the building of a new Hall, they were kept at the Castle of Dublin, "where, the rooms where this treasure was kept being left open, ... most of the best manuscripts were stolen away." This probably accounts for our missing volume.

[11] The books are bound at the top instead of at the side and the author has written from both ends towards the middle of the book. Sometimes he fills both sides of the leaf, sometimes only one, leaving the other to be filled after turning the book over and beginning at the back. This confusion was not worked out by whoever catalogued the books for the British Museum, with results that are very misleading to the student. In the catalogue the first book is dated correctly, but the second is put under the year 1640.

II. Secondary Works

A. *Predecessors of Gardiner*

It would be useless to enumerate all of these separately for, with three exceptions, they have been entirely superseded by Gardiner. They have based their work on the collections of source material published in Rushworth's *Collections* and the old *Parliamentary History*, which meant little more than a poor copy of the *True Relation*. This, alone, is reason enough for excluding them.

(1) John Forster, Sir John Eliot, 2 vols. 2 ed. London 1872. (1 ed. 1864).

In this work, Forster devotes considerable space to the Parliament of 1628. In addition to the regular sources he had access to Nethersole's letters and the *Port Eliot MSS.* This collection contains all of Sir John Eliot's own manuscripts. For this Session there are seven speeches by Eliot, a long report which has no bearing on the Petition of Right, and brief memoranda by Eliot. Though much fuller than those given anywhere else these copies of Eliot's speeches are not as valuable as Forster would have us believe. In commenting on the May 23 speech, Gardiner pointed out that, though in the main the speeches are correct, they "were subject to some manipulation."[12] They do, indeed, give evidence of having been written up some time after the speech had been delivered. In the light of the more abundant material which is now accessible, they must be valued as contributions to the 17th century oratory rather than as an actual part of the debates. Of more importance are Eliot's brief memoranda with which Forster has made us acquainted. Forster's great contribution, however, lies not in the new material he offers, but in his use of the old. He was able, to a remarkable degree, to enter into the spirit of the time and of the men. With that for a background, he presents a vivid and inspiring picture of stirring events. But it is just here that one must be on his guard in reading Forster, for his imagination lured him on to fill in the gaps due to his all too scanty information.

(2) Henry Hallam, The Constitutional History of England from the accession of Henry VII to the death of George II. 2 vols. 5 ed. 1846 (1st ed. 1827).

This constitutional history is carefully worked out from all the printed and manuscript sources then available. Besides the meagerness of the material, the book suffers from the author's acceptance of the misconceptions regarding Magna Carta prevalent at that time.

(3) George Brodie, A Constitutional History of the British Empire from the Accession of Charles I to the Restoration: . . . including a particular examination of Mr. Hume's statements relative to the character of the English government. 3 vols., new edition 1866.

Alone among the historians of his time, this writer made a sincere effort to find out the contemporary opinion regarding the nature of the Petition of Right.

B. *Samuel Rawson Gardiner*

History of England 1603-1642. 10 vols. New Impression, 1901.

In his history, Gardiner has devoted two chapters to the proceedings of this Session of Parliament. In source material, Gardiner's main advantage over his predecessors lay in his having access to two private diaries and to a copy of the best form of the *True Relation*. The diaries he used were *Nicholas's Notes* and the first volume of the *Harleian*.[13] From the small use that he made of the latter, one would judge

[12] VI, 285 note.

[13] It was probably due to the poor cataloguing that Gardiner missed the second volume.

that he did not value it as highly as it deserves. For the *True Relation* he used the *Harleian* copy (4771), which failed him entirely for the last month. Nowhere, either by comment or otherwise, does Gardiner show that he had any realization of the nature of the manuscript he was using.[14] He seems always to have thought of it as an original instead as of a copy, no one knows how many times removed from the original, and so necessarily full of copyists' errors. Some of his direct quotations reveal these imperfections. A common error in all copied manuscripts is an omission due to the repetition of a word or phrase. In the Bill of Right, as given by Gardiner, between the word *bailed* and its repetition there are left out forty-three words.[15] Again, in a speech which he gives in the text,[16] he has *was able* where another copy[17] has *should not be able*, a reading which, from both the context and agreement with independent sources, is undoubtedly the correct one. But about this same speech Gardiner has made a much more serious blunder. In most of the manuscripts the names of the speakers are given only in the margin. Unless the copyist was alert he sometimes omitted a name. Then the speech appeared to be but an added paragraph to the one preceding. The name of Sir Humphrey May, one of the King's firmest supporters, was omitted from Gardiner's manuscript at this point. As a result Gardiner attributes to Wentworth, opinions which serve to line him up with the court party.[18]

Considered as a narrative history, one can find but little to criticise in Gardiner's work. He is a model of accuracy. Fuller information serves rather to amplify than to correct. But after reading his account one feels lost in a mass of detail. There is no summing up or explanation of events. One can not but admire the clever way in which he often evades the direct issue. Since he was a writer of narrative history, one can not demand that he should have settled all the constitutional questions involved in the series of events. But had he himself been more conscious of the questions it would have affected his selection of facts. In reading the sources primarily for the events of the day, it is extremely difficult to get below the surface. Until the problem presents itself, one is apt to miss the word here and there that is the key to its solution. Only in this way can one account for Gardiner's having neglected entirely the investigation of the judges' decision in the 'late habeas corpus case,' or the important debates which resulted in the change from a bill with a penalty to one that was only explanatory.

C. Writers since Gardiner

Since Gardiner wrote his history no detailed study has been made of either the Petition of Right or of this Session of Parliament. It has been touched upon in brief narrative history, in text books of constitutional history, and in biographies. But in no case has any attempt been made to get behind Gardiner.

[14] There is no reason why Gardiner should not have known the character of the manuscript. Even if the many copies in the Harleian Collection had not suggested it to him, Bruce's article on the different copies of the *True Relation* for 1629 (Archaeologia xxxviii, 237-245) should have called his attention to the fact.

[15] VI, 265 note.

[16] *Ibid.*, 285-286.

[17] Mass. MS.

[18] Gardiner made even greater use of this speech in an article entitled *The Alleged Apostacy of Wentworth* (*Lord Strafford*) (Quarterly Review for April, 1874, pp. 230-240). It becomes there the culmination of his whole argument. "To quote Wentworth's own words, as we have done," he states, "is to show that the principles which he defended were his own, the dangers against which he wished to provide were seen in their entirety by no eye but his, and the remedies which he recommended were also his own. He could not therefore have apostasized from opinions which he only very partially shared" (p. 239).

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